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REPORT OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH.

BY

JAMES LUKIN ROBINSON, ESQ.,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

VOL. XI.

CONTAINING THE CASES DETERMINED
FROM EASTER TERM, 16 VICTORIA, TO HILARY TERM, 17 VICTORIA ;
WITH A TABLE OF THE NAMES OF CASES ARGUED,
AND DIGEST OF THE PRINCIPAL MATTERS.

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JUDGES
OF
THE COURT OF QUEEN'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

THE HON. JOHN BEVERLEY ROBINSON, C. J.
" WILLIAM HENRY DRAPER, J.
" ROBERT EASTON BURNS, J.

Attorney-General :

HON. JOHN ROSS.

Solicitor-General :

HON. JOSEPH CURRAN MORRISON.

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REPORT OF CASES
IN THE
COURT OF QUEEN'S BENCH.

EASTER TERM, 16 VICTORIA.

Present :

THE HON. JOHN BEVERLY ROBINSON, C. J.

“ WILLIAM HENRY DRAPER, J.

“ ROBERT EASTON BURNS, J.

HALL v. KISSOCK.

Money lent to assist escape from creditors—Security taken therefor.

A security taken for a *bonâ fide* loan of money is not fraudulent and void, merely because the money was lent to enable the borrower to leave the country in order to escape from his creditors.

C. being involved went to K., and informed him that H., a creditor, was pressing him, and that he must leave the country. K lent him money to enable him to get away, took a confession of judgment payable immediately, entered judgment and issued execution, on which the sheriff seized C.'s goods which he had left behind. The day following the execution H. sued out an attachment against the estate of C. as an absconding debtor.

Held—the *bonâ fides* of the loan not being disputed—that the object for which the money was advanced would not deprive K. of the benefit of his judgment as against H.

This was an interpleader issue, directed under the following circumstances :—

In the month of November 1851 one Thomas Chettle, who had previously carried on business in the city of Toronto as a grocer, became so much involved as to be unable to meet his engagements or continue his business. In the course of such business he had become indebted to the present plaintiff, and on the 26th of November the debt remained unliquidated. What quantity of goods Chettle then had on hand, or what they were supposed to be worth, was not stated or shewn in

any way. On the 26th of November Chettle gave Kissock, the defendant, a confession of judgment for a debt of £200, payable on the 27th of November. Judgment was entered upon the confession on the 27th, and execution thereon placed in the sheriff's hands on the 28th of November; Chettle absconded from the province on the 28th or 29th of November, and on the 29th the plaintiff Hall sued out an attachment against the estate real and personal of Chettle, as an absconding debtor, and on the same day the attachment was placed in the sheriff's hands. The sheriff proceeded to sell the goods under the *fi. fa.* of the defendant, and realized the amount for which the *fi. fa.* was indorsed. The plaintiff made a claim on the sheriff for the money thus realized; that is, that he should hold it subject to the attachment, and should not pay it over to the defendant, because he, the plaintiff, contended that the defendant's judgment was, as against the plaintiff's attachment, fraudulent and void.

On the 22nd of January 1852 the Chief Justice of the Common Pleas, on the application of the sheriff, made an interpleader order whereby he directed an issue to be tried, and that the question should be whether the judgment obtained by the defendant against Chettle, and the execution against Chettle's goods issued thereon, were fraudulent and void as against the plaintiff and his attachment as an attaching creditor of Chettle, he being an absconding debtor,—on condition that the sheriff should pay the money into court. The parties thought the most convenient mode of settling and disposing of the matter would be to try the question under the issue thus directed, rather than to move the court against the interpleader order as having been made in a case not contemplated by the statute.

The issue came on to be tried before, Burns, J., at the assizes held in Toronto in October, 1852, when the facts as proved were these:—Chettle had been on intimate terms with the defendant, and had been in the habit of frequently borrowing money from him by means of bills or acceptances, but at the time of giving the confession there was no antecedent debt due from Chettle to the defendant. It seemed that Chettle acquainted the defendant with his inability to

carry on his business, and complained that Hall, the plaintiff, was pressing him, and that he must leave the country. The wife of Chettle proved that the evening before he left the country the defendant was at their house consulting with Chettle about his going away, and she stated that she believed the defendant was well aware before that time that Chettle intended to leave the country. The evening before Chettle left, another person who was present stated that he heard the debt spoken of between Chettle and the defendant. After Chettle left the country his wife went to reside at the defendant's house. The amount for which the confession was given was money then advanced by the defendant to Chettle, and advanced to him after he knew of his intention to leave the country. There was no question about the consideration for the confession being real; but it was contended that, though real, it was to assist Chettle to leave the country, and that the confession thus given, to operate by execution upon the goods left behind, was a fraud upon the plaintiff's attachment.

The learned judge said he could not consider that the facts constituted such a fraud as came within the prohibition of any law; and though it might be a moral wrong for one person to give another the means whereby he was enabled to defeat the payment of a just debt, and though given under the knowledge that it would have that effect, yet he was not aware of any rule of law which entitled that other person to say, that because such moral wrong was committed, there was a legal right to deprive him of a real subsisting debt; and under such circumstances he held he must direct a verdict for the defendant.

In Michaelmas Term last *Vankoughnet*, Q. C., obtained a rule to shew cause why the verdict for the defendant should not be set aside and a new trial had, on the ground that the verdict was contrary to law and evidence, and for misdirection.

Hagarty, Q. C., shewed cause.

In addition to the cases referred to in the judgments, *Lewis v. Davidson*, 4 M. & W. 654; *Bousfield v. Wilson*, 16 M. & W. 185, were referred to for the defendant; and *Harman v. Fishar*, Cowp. 117, for the plaintiff. See also *Thoyts v. Hobbs*, 7 Ex. 810.

ROBINSON, C. J.—What is imputed to the defendant as the fact that ought to make the judgment void is, that with the knowledge that Chettle was in failing circumstances, that in particular he was indebted to Hall who was pressing him for payment, and that he contemplated leaving this province and going to the United States, he lent him the sum of money for which he took from him the confession of debt which forms the foundation of his judgment. And it is contended that under such circumstances he cannot make use of the judgment so obtained, and of the execution which has issued under it, to the prejudice of Chettle's creditors.

No doubt, on such a transaction it would become a fair question for a jury whether the money was *bond fide* lent or whether there was not a secret understanding between Kissock and Chettle that it should be either returned at once or soon after to him or held by some friend in trust for him ; in other words, that the loan was merely colorable and pretended, not real, in good faith, as regarded the actual fact of lending the sum. Kissock's right to his execution, however, does not seem to have been questioned on that ground, and the learned judge reports that there was no attempt at the trial to place the transaction in that point of view. It seemed to be conceded that beyond doubt Kissock actually lent the money. The sum was rather large,—£200. It was more than Chettle could have required for merely taking him out of the country, and it might have been surmised to be rather improbable that a man would lend another £200 when he was on the point of absconding to avoid his creditors. If he did so, it was with the knowledge, I suppose, that the goods which Chettle would leave behind him would be enough to make him secure ; and taking care to act promptly he may have been willing to let Chettle have the money in order to serve his purpose in the exigency in which he was placed.

That seems then to bring the case very much under the principle of *Wood v. Dixie* (7 Q. B. 892,) in which it was held that a party may buy goods of a person indebted with the express view of preventing them from being taken in execution for his debt, and that this will not avoid the sale for that a mere intent to defeat a particular creditor (or

creditors generally) does not constitute a fraud. If Kissock could under the circumstances have actually bought Chettle's goods to the amount of £200, in order to give him the means of leaving the country, he might equally have lent him the same amount, and taken security upon his goods. In *Wood v. Dixie* it is true that the facts, as remarked on the argument of the present case, were not such as to require the court to state the law so strongly as they did in favor of the assignment; but it had in cases previous to that, been repeatedly stated to juries, by judges under similar circumstances, that the fact to be tried was whether the assignment was colorable and pretended, made upon a secret trust, or whether it was really intended by the parties that the property should pass. Here the question would be—which indeed was not made or desired to be made a question—whether the money was really lent and the debt consequently an actual debt for which the confession was taken. Assuming that it was I can find no authority that would support us in depriving Kissock of the benefit of his execution. It was not shewn that he did anything more than lend Chettle money at a time when he understood he was indebted, and was on that account about to leave the province.

It was argued by Mr. Vankoughnet that what Kissock did was a direct contravention of the statute 13 Eliz. ch. 5, against fraudulent judgments: but this I apprehend we cannot concur in for the act is aimed at conveyances and judgments that are *feigned* and fraudulent. It has been laid down in other cases, as well as in *Wood v. Dixie*, that the mere intent to defeat an execution does not make a sale void at common law, or under the statute 13 Eliz. This is opposed no doubt, to the doctrine maintained by Lord Mansfield in *Cadogan v. Kennet*, where he said, "I have known several cases where persons have given a fair and full price for goods, and where the possession was actually changed; yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void."

The law must be admitted I think to have been on a sounder and better footing when it was thus administered; but if we could revert to those times, and rest with confidence

upon what was ruled in such cases, yet here we are asked to go somewhat farther. The first point to be settled in this case is, whether Kisson's debt was a legal debt or not. If it was, he had the same right as any other creditor would have to obtain his judgment and execution. Now I do not know any authority we should have for holding that a man cannot lawfully lend another a sum of money who is in difficulty, even though he should know that he will expend a part of it in paying his expenses to a foreign country, in order to withdraw from the reach of his creditors. If every man is not at liberty to do this no man can be, for we could not discriminate, and make allowance for what might naturally be done by relations and persons under peculiar circumstances in order to save parties from imprisonment, who from misfortune or otherwise are unable to satisfy their creditors. I cannot say that they are bound to look upon it as an immoral act to lend them money in order to enable them to reach another country. There have been many cases in which money has been lent with a knowledge that it will probably be employed by the borrower in gambling, or in purchasing goods intended to be smuggled or perhaps lent out again on usurious interest; but where the lender merely lends his money, and has no connection whatever with the use that is to be made of it, he can recover it back. As it is not shewn that Kisson's judgment is not for money really and *bona fide* lent, and as I cannot say that he would not lawfully lend it with a knowledge that part of it would probably be used by Chettle in paying his expenses to a foreign country, which would remove him from the convenient remedy of his creditors, I think this rule must be discharged.

DRAPER, J.—In Bacon's essay on the use of the law it is said, that though a man may fear execution for debts, "yet he may sell his goods outright for money at any time before the execution served, so that there be no reservation of trust between them, that repaying the money he shall have the goods again, for that trust in such case doth prove plainly a fraud to prevent the creditors from taking the goods in execution."—(*Opera*, vol. 4, p. 125). This general proposition is only applied in *Wood v. Dixie*; and if it be law, it seems

decisive of this case, upon the broad question of the cognovit not being void, even admitting it to be given to defeat this creditor; for if a sale of the goods taken in execution had been "made outright for money" by Chettle to the defendant without any reservation of trust between them, and being so made, must have been sustained as legal, I can see no reason why a cognovit given to secure money actually advanced and paid, is not equally sustainable.

It was urged, however, that this transaction was against the policy of the attachment laws of this province, which in the event of a debtor's absconding contemplate an equal division of all his property; and *Jackson v. Davidson* (4 B. & A. 691), and *Murray v. Reeves* (8 B. & C. 421, were cited, in which securities given to prevent or buy off opposition to the discharge of an insolvent debtor were held void as against the policy of the law. The cases are not however analogous. The equal division provided for by our attachment laws extends only to attaching creditors; to make the same principle apply, would be to convert an attachment into a fiat or commission of bankruptcy in which case the preference given to a particular creditor would be a fraud on the law. But an execution creditor is not hindered or affected in his proceedings by the absconding of his debtor, and the issuing by other creditors of attachments against the property of such debtor; and unless the proposition can be carried to this length,—namely, that the defendant cannot recover his debt at all on account of its arising *ex turpi causa*, and as a consequence that it could not be recovered against the debtor himself, apart from any consideration of the interests of other creditors—this cognovit given for the amount due must be valid and effectual. In the absence of any authority, I am not prepared to accede to this proposition. Suppose exactly the same transaction, of an advance of money and a cognovit with immediate execution, but that Chettle remained here until after his goods had been sold by the sheriff and the proceeds had been paid over, and that he had then absconded; I do not suppose it will be contended that the transaction could be all opened in favour of any creditor, though the pressure of that creditor, and the intent to evade a suit by

him constituted the only object of the loan and of the cognovit. No doubt it would be more equitable that one creditor should not be paid at the expense of all other creditors of a trader, and that an act done in contemplation of what would be an act of bankruptcy, should not prevail against the interests of all other creditors; but that is a consideration for the legislature, not for the court. We are not called upon to supply the want of a law which the legislature do not think it wise or proper to enact, or to extend the provisions of existing laws by our decisions, so as to prevent those hardships which it is the peculiar province of a system of bankruptcy laws to avert.

Upon the evidence given, according to my view of the law, the learned judge could not have directed the jury otherwise than that the plaintiff had failed to make out his case, and this was substantially the direction given by him.

BURNS, J., concurred.

Rule discharged.

LOOMER ET AL. V. MARKS.

Acceptance of note in satisfaction of account—Effect of, as to remedy on the latter.

Assumpsit for goods sold and delivered and on accounts stated. Plea—That before the commencement of this suit the defendant made and delivered three negotiable notes to the plaintiffs, "who then accepted and received the same in full satisfaction and discharge of the sum of money and causes of action in the said declaration mentioned." Replication—that the notes were dishonoured at maturity and still remain in the plaintiff's hands unpaid.

Held, that the replication was bad, for the plaintiffs having accepted the notes in full satisfaction and discharge of the original cause of action, had lost their remedy upon the latter.

ASSUMPSIT on the common counts, for goods sold and delivered, and on account stated, claiming £200.

The defendant pleaded, fourthly—that the money claimed in the declaration for goods sold, and on the several accounts therein alleged to have been stated is money claimed by the plaintiffs for and in respect of goods heretofore, to wit, on &c., sold and delivered by the plaintiffs to the defendant; and that the said several statements of account were made of and concerning the money so due, &c. : that after the said causes of action accrued, and before the commencement of

this suit to wit on &c.; it was agreed between the plaintiffs and the defendant that the defendant should make and give to the plaintiffs certain negotiable promissory notes, for the payment of the said sum of money in the declaration mentioned, and *in satisfaction and discharge* of the same and of the said causes of action, which said notes the plaintiffs then agreed to accept and receive from the defendant in such satisfaction and discharge: that in pursuance of the said agreement the defendant did afterwards, to wit, on, &c., make three negotiable promissory notes for the payment to the plaintiffs, or bearer, of the said sum of money, and then delivered the same to the plaintiffs, who then accepted and received the same from the said defendant *in full satisfaction and discharge* of the sum of money and causes of action in the said declaration mentioned. Verification.

Replication—that the said promissory notes became due and payable respectively on, &c., and long before the commencement of this suit and the plaintiffs further say, that the said notes were, and each of them was dishonoured at maturity by the defendant; and the said notes were not, nor was any or either of them, then or ever paid by the defendant or any person on his behalf; and the said notes and each of them at the commencement of this suit remained and were and still remain, and are, and is dishonoured and unpaid, and in the hands of the plaintiffs, who then were and still are the holders thereof. Verification.

Demurrer, assigning the following causes—that the said replication attempts to raise an immaterial issue, in this, that although the same admits that the notes in the said fourth plea mentioned were taken in full satisfaction and discharge of the causes of action in the declaration contained, nevertheless it is stated that the said notes were and still are dishonoured in the hands of the plaintiffs; whereas, if as is admitted the said notes were taken absolutely in satisfaction and discharge of the said causes of action, the defendant's liability in respect to the said causes of action could not be revived. Joinder in demurrer.

Dempsey for the demurrer. *Hagarty*, Q. C., contra,

In addition to the cases cited in the judgment, Cumber

v. Wane, 1 Sm. L. C. 146 ; Kearslake v. Morgan 5 T. R. 513 ; Price v. Price, 16 M. & W. 232, were referred to for the defendant ; and Simon v. Lloyd, 3 Dowl. 813 ; Griffiths v. Owen, 13 M. & W. 58, for the plaintiffs.

ROBINSON, C. J., delivered the judgment of the court.

It seems that formerly the defendant having given his note merely for the original demand, would have operated only as a suspension of the remedy upon such original demand during the period that the note had to run ; but that if he still held the note at maturity, and it was unpaid he could sue on the original cause of action, which we think could not have been held to have been extinguished by the giving of the note even though it had been alleged to have been given and accepted in satisfaction of such original demand. But we take the law to be now otherwise settled, according to recent decisions ; and that, when the defendant's allegation is *not* that the note was given by him "for and on account of the debt," but that it was given by him, and accepted by the plaintiff, *in satisfaction and discharge* of the original cause of action, such a plea is a good answer to the action upon the original demand, and consequently that, the remedy being confined to the note, it is no good answer to the plea to reply that the defendant did not pay the note at maturity, and that the plaintiff still holds it in his hands unsatisfied.

It appears to me that what has been settled by recent decisions in England is an innovation upon the law ; but it is difficult to refuse one's assent to the reasonableness of what we are inclined to look upon, perhaps erroneously, as the modern doctrine on this point.

Let us suppose a case of mutual dealings between A. & B., with numerous items of account on both sides, and that at several times in the course of their transactions they have met and settled accounts, and struck balances ; and finally after these repeated settlements they meet, and in order to close their dealings, and render it unnecessary to refer back to accounts or vouchers, they settle a balance, which B. admits is due by him to A., and for which B. then gives his negotiable

note to A., payable in three months, and A. gives B. this memorandum: "Settled accounts this day between me and B., and I have this day taken his promissory note payable to me, or order, for £— at three months, which I accept in satisfaction and discharge of all former accounts and settlements, and debts due by him to me." It would not be expedient or reasonable that A. should be allowed after that to open the account, and sue upon the original cause of action. This remedy ought to be confined to the note, and, whether paid or not, the note should be a discharge of the former debts, accounts, &c. Then if such, were the transaction, and such should be the effect, we do not see how the plea could be otherwise than this plea is. We think the case of *Sard v. Rhodes* (1 M. & W. 153), *Sibree v. Tripp* (15 M. & W. 23), and *Belshaw v. Bush* (11 C. B. 91), lead to this conclusion. The point seems to have occasioned a considerable conflict of decisions in American courts and to have been only gradually settled upon its present footing in England.

We think our judgment should be for the defendant on demurrer.

Judgment for the defendant on demurrer.

AITKIN ET AL. V. BULLOCK AND PENTLAND.

Assignment by prisoner after judgment—Effect of on application for discharge—
10 & 11 Vic. ch. 15.—5 W. IV. ch. 3

A debtor applying for his discharge under 10 & 11 Vic. ch. 15 must shew that he has not since judgment disposed of his effects in any way so as to defeat the creditor's remedy; an assignment, after judgment, for the benefit of creditors generally, will therefore prevent him from obtaining his discharge.

Quære, whether such an assignment would affect his claim to the privilege of gaol limits.

Leith obtained a rule *nisi* to discharge the defendant Pentland from custody. under *ca. sa.*, in this suit.

Hagarty, Q. C., shewed cause, and cited *Binns v. Towsey*, 7 A. & E., 869.

The facts of the case appear in the judgment.

ROBINSON, C. J. delivered the judgment of the court.

On the 18th of April 1853, Pentland, having given notice,

applied under the 10th & 11th Vic. ch. 15, sec. 3, for his discharge he had been in close custody since the 1st of February, 1853. Interrogatories were in consequence filed.

Pentland, in his answers, for all we can say, gives all the information in his power as to the affairs of the firm and the present assets of himself and partner jointly and individually and of past transactions. The accounts are voluminous; a critical dissection of them and of the answers which we suppose the judge before whom the matter was, went into at his leisure, may discover some points on which the answers are not definite and satisfactory. We do not understand that we are expected to repeat that operation; if we are, the plaintiffs must point out what answers they except, and in what respect they desire further information. At present I can only say that, having read all the answers and looked over the schedules, I see no proof of any assets remaining which the defendants could apply to paying this debt, though I do not say I am satisfied with all that is said and with all that has been done: that is seldom the case upon any of these applications.

We understand, however, that the case comes before us chiefly if not solely, in consequence of a doubt in the mind of the learned judge who had the case before him in chambers as to what should be held to be the effect on this application of the defendants having, as Pentland's answers admit, made an assignment *after the commencement of this action*, and while he, Pentland, was in custody upon this suit, of all their effects, debts, &c., to a trustee, for the benefit of all his creditors, and in order to pay them ratably; and of this defendant individually having made an assignment of all his property and effects to the same trustee and for the same purpose.

This point under circumstances more or less similar to those in the present case, has engaged the attention from time to time of individual judges, upon applications made to them in chambers; but different views, it is stated have been taken of the intention and effect of the last statute, 10th & 11th Vic. ch. 15, in this respect; and it is felt to be desirable that the court should give their opinion in the present case,

in order that the practice may be more certainly settled. It is desirable too, for the further reason, that if the effect we may think it right to give to the statute should be found to be at variance with the intention of the legislature, or to leave the law upon an inexpedient footing, the necessity of an alteration may the sooner engage attention.

The Statute 10 & 11 Vic. ch. 15, is in one respect singular. The preamble would lead us to suppose that the leading, if not the only object of that statute, was "to afford additional means for the discovery and application of the property and effects of judgment debtors, for that alone is recited as the intention of the act; and yet the provisions are altogether in favour of the debtor, not of the creditor. We must suppose, then, that the legislature did not mean to deprive the creditor of such means as he already had of enforcing the discovery, and insuring the application of the property of his debtor. That they give him no additional protection against fraud or injustice, seems inconsistent with the purpose of the act as declared in the preamble; if we were to look upon the statute as virtually abolishing such securities as the existing law gave to the creditor, while it provides no others, it would seem a strangely inconsistent act, and hardly intelligible. Besides giving to persons in custody upon attachments for non-payment of money the same privilege as to gaol allowance and gaol limits as if they were prisoners in execution upon judgments, and besides making the gaol limits in respect to all debtors co-extensive with the district, it seems to have been the object, and I think the main object, of the legislature, to enable prisoners in execution to apply for and obtain their discharge without the necessity of their remaining for any specified time in custody, as the former law required they should, before such an application from them could be entertained. That was a great relaxation from the existing law, 5 W. IV. ch. 3, which required, for the security of the creditor, that the debtor must remain a certain time under the coercion of the process before the indulgence could be extended to him, in order that it might be in some measure ascertained whether he really had no means of relieving himself by paying the debt. He

could not apply for absolute discharge upon his affidavit of insolvency until he had been three months in custody, if the debt were not over £20, or six months in custody when the debt exceeded £20, but did not exceed £100 or twelve months if the debt were beyond the £100. The statute 10 & 11 Vic. ch. 15 allows the debtor to apply at any time upon an affidavit of insolvency, without waiting any prescribed period, and this as well when he is enjoying the gaol limits as when he is in close custody. While this great boon is conferred upon the debtor, no additional security against fraudulent misapplication or concealment of assets is given to the creditor. The only provision for his protection is, that the debtor shall not be discharged until he shall have satisfactorily answered upon oath interrogatories which the creditor may cause to be filed and served before the expiration of the fifteen days notice of application which the statute requires shall be given, *"in the same manner and to the same purport as prisoners in execution for debt, before the passing of this act, were required to do."*

Now this statute of 10 & 11 Vic. ch. 15, although it contains provisions very materially affecting several provincial statutes on the subject of insolvency and of execution debtors, neither appeals, nor refers to, nor in any manner specially notices, any existing provision; but it leaves the courts to carry out its enactments consistently with existing statutes as they best can.

But we see the statute does expressly require that before the court can be warranted in discharging a debtor in execution upon his statement of insolvency, he must satisfactorily answer interrogatories *"in the same manner and to the same purport as prisoners in execution for debt, before the passing of this act, were required to do."* Several acts, we know, were at that time in force respecting interrogatories to be answered by debtors in execution, some of them having particular reference to the claim of such prisoner to the weekly allowance from the plaintiff, others to their right to obtain and remain upon the gaol limits, and others to their claim, on proper application, to be discharged after a certain time, when they could satisfy the court that no benefit could arise

to the plaintiff from keeping them longer in custody. It is the last class of cases, which was the most closely connected with the leading object which the legislature had in view in passing the statute 10 & 11 Vic. chap. 15; and we do not therefore see how we can imagine that the statute 5 W. IV. ch. 3, can be excluded from our consideration when we are applying the provisions of this latter statute; because that was the law on which the practice mainly, if not exclusively, rested as to the discharge of prisoners in execution, and the necessity of their satisfactorily answering interrogatories before they could obtain their discharge on the ground of insolvency. That act made a particular and comprehensive provision as to what should be done in these cases and though as it was passed at first it was to be in force but for a limited time the legislature, after some years' experience of its effects, made it perpetual by the statute 3 Vic. chap. 6. It was founded on the principle set forth in its preamble, that "the imprisonment of persons in execution for debt is no otherwise justifiable than as a means of compelling such persons to apply whatever means or property they may be possessed of, or may have under their control, to the satisfaction of their creditors;" and, after giving to the proper tribunal full power of investigating the circumstances of the debtor applying for his discharge, it provides (sec. 5) "that when in the opinion of the court the party at whose suit the debtor is in custody shews no reasonable ground whatever (and in such case only) for expecting benefit from the further detention of the debtor in execution, it shall be lawful for the court to make an order for discharging him forthwith."

So far it seems only to require that the debtor shall be able to satisfy the court that his creditor can gain nothing whatever by detaining him. But we find that this statute does contain within it a provision which qualifies what might otherwise be its construction and effect, and which is inconsistent with the idea that the debtor after he has been committed to custody in order to compel him to satisfy the judgment which has been obtained against him, can by his voluntary act strip himself of his property, and then insist upon being discharged, because he has *no longer* the means

of satisfying the judgment. The 6th clause of the statute 5 W. IV. ch. 3, to which we now refer, requires in express terms that the debtor in the affidavit which he must make and file before he can obtain his discharge on the ground of insolvency, must, among other things, swear "*that since judgment in the cause was rendered against him he has not made any disposition or conveyance of his property or his effects in order to defeat the remedy under the said judgment.*" Now it is part of the present case, as brought out in answer to the interrogatories, that the defendant Pentland, after being committed in execution in this case, has voluntarily made an assignment of all his partnership and individual property to a trustee selected, for all that appears, by himself, for the benefit, as he says, of his creditors generally. That may be a very honest intention, and when it is carried out in such a manner under proper legal proceedings which insure the due fulfilment of the trust, there may be no hardship in compelling all creditors to abide by it; but this is no proceeding of that kind; it is a step taken by the debtor himself, not under the sanction or direction of any court, and which may or may not prove in the end beneficial to his creditors; and it is avowedly and evidently taken in order that the plaintiffs may not reap the benefit of their judgment. It is a *disposition made by him of his effects after judgment in order to defeat the remedy under the judgment*, and as such, it comes within the very words of the law as it stood at the time of passing the 10th & 11th Vic. ch. 15, and within the intent and meaning of the law too, as we conceive, for we do not take the provision to be confined to colorable and pretended dispositions, or to dispositions made with a view morally fraudulent. The legislature meant by it, we think, that the debtor, after he had been taken in execution, should apply his means in satisfying the execution debt, and not by preference pay the debts of others, however just, who had obtained no judgment, and then claim to be discharged from the execution because he had disposed of his effects.

We think, if such a case as the present had come before us before the statute 10 & 11 Vic. chap. 15, was passed, we ought so to have applied the law as it then stood under

the existing law 5 W. IV. ch. 3, we must have held, under the 3rd section, that *we were not satisfied that the prisoner was entitled to relief under that act*; and this being so, we are of opinion that when the debtor, upon an application made by him for his discharge under the statute 10 & 11 Vic. ch. 15, cannot satisfy the court that he has not, since judgment against him, disposed of his effects in order to defeat the remedy under the judgment, we cannot say that he has *satisfactorily answered upon oath such interrogatories as the plaintiff has caused to be filed, as prisoners in execution for debt before the passing of that act were required to do*.

This construction of the last act seems to us inevitable, though clearly it may be said against it that where the court is really satisfied that the debtor has stripped himself of all his effects, and has no means under his control, the keeping him in custody can hardly be justified as a measure of coercion, but has more the appearance of being a punishment for what the debtor has done, and a punishment without limit for an act which he is unable to recall. The answer to that is, that the legislature, in the statute 5 W. IV. ch. 3, had clearly both sides of this question in view, and did determine that the conduct of a debtor should not be looked upon as satisfactory, and entitling him to be discharged, under such circumstances: that the statute 10 & 11 Vic. does not repeal any part of that statute, except as its provisions may be found to conflict with it; and that upon this point it retains the former law in force, by referring us to it as still binding in regard to the satisfaction which the debtor must give to the court by his answer to interrogatories.

We will add, that whether a debtor who has acted as this defendant has done, is to be considered as having deprived himself of a claim to the privilege of gaol limits, and exposed himself to be committed to close custody, is quite another question, which may be brought before the court in a proper manner. The defendant is now moving to be wholly discharged from custody under the writ.

The same view which we now take of the statute was taken by Mr. Justice Draper, in the case cited on the argument of Gillespie et al. v. Nickerson (6 U. C. R. 628), and

we supposed that this was understood to be the prevailing impression, though doubts have been expressed under the circumstances of different cases ; and we believe most of the judges have more or less fluctuated in their opinion upon the point. It may seem that this effect of the statute may operate hardly upon the debtor, but the hardship ceases when he knows that he is not at liberty to make voluntary dispositions of his property, and leave his judgment creditor unpaid ; or, at least, that by doing it he will expose himself to the consequences which we are now considering. If it shall be thought that, on the grounds of policy and humanity, that the former law, which the statute 10 & 11 Vic. ch. 15, does not in this respect interfere with, should be altered, and that the judgment debtor should be allowed voluntarily to divest himself of the means of paying the creditor who has him in custody, and then claim as a matter of right to be discharged on account of his inability to pay him, the legislature can apply themselves again to the subject, and place the law clearly upon that footing.

Rule discharged.

REED V. REED.

Promissory note—Account stated—Evidence.

The plaintiff declared on the following as a promissory note:—"Three months after date, we, or either of us, promise to pay to Elias S. Reed (the plaintiff), or John Fraser, his guardian, at the Post Office, Embro, £119 17s., Cy., value received in rent of farm,"—adding account on an account stated. It was proved that the defendant had been in possession of the plaintiff's farm before and after the note was made, which was given for rent due, and that the plaintiff was abroad at the time of making the note.

Held, that the writing, though not a promissory note, would support a recovery for the plaintiff under the account stated.

Held, also, that evidence was inadmissible of a verbal understanding that the note was not to be enforced until the plaintiff's return, or until he should send a power of attorney to some one to collect the note.

ASSUMPSIT on a promissory note made by the defendant on the 22nd of November, 1851, to the plaintiff, for £119 17s., payable in three months ; with counts on account stated, and for use and occupation.

Pleas—1st. *Non fecit*.

2nd. *Non assumpsit*, to the common counts.

3rd. That the plaintiff in 1845, being an infant, J. F. and

J. R. were appointed his guardians according to law ; that in 1849 the plaintiff, being still an infant, went beyond seas, and has remained abroad ; that in his absence, he being still an infant, and the defendant being indebted to him in £119 17s., it was agreed between the defendant and J. F., one of the guardians, that the defendant should make the note sued on, and should then deliver the same to the said J. F. in payment and satisfaction of the debt, upon the condition that the said J. F. should hold the note, and not part with or make use of the same till the plaintiff should return to this province, or, if he should not return, till he should send a power of attorney to some person to receive the note and collect the amount ; that the note was made, and accepted by J. F. on that condition ; that the plaintiff has always since remained abroad, and has sent no power of attorney to collect the note—with a special traverse that the defendant made the note in manner and form, &c.

The note was made by the defendant and one Dent, and ran thus :—

“Three month after date we or either of us promise to pay to Elias S. Reed” (the plaintiff), “or John Fraser his guardian, at the Post Office Embro’, £119 17s. Cy., value received in rent of farm.”

The guardian, Fraser, was examined at the trial at Woodstock before Burns, J., as a witness, and swore that he drew the note ; that the plaintiff came of age a few days after it was signed, and before it fell due ; that he acted for the plaintiff at his request ; that the defendant had been in possession of the plaintiff’s farm before and after the note was made, which was given for rent due. He proved £20 due for rent in addition to the sum for which the note was given.

The defendant’s counsel proposed to shew that the note was made and delivered on the understanding that it was not to be collected till the plaintiff returned to this country or should send a power of attorney to some one to collect the note. The learned judge rejected that evidence, and directed a verdict for the note and interest, and the rent subsequently accrued.

It was objected in the course of the trial that the writing

was not a promissory note, being payable to the plaintiff or his guardian.

D. G. Miller moved for a new trial on the law and evidence.

Cur. adv. vult.

ROBINSON, C. J., delivered the judgment of the court.

We see no difficulty in the way of the plaintiff's recovery upon this just and plain cause of action, which is in reality a demand for rent of the plaintiff's farm, which the defendant has occupied. No doubt of the writing which was given in evidence was not a promissory note, and does not therefore support the first count. But, taken in connection with the facts proved, it supports the recovery upon the common count on an account stated, for it is an admission of a debt due to the plaintiff for value received "*in the rent of the farm,*" and of course due to the proprietor of the farm. The learned judge was right, we think in rejecting evidence of a verbal understanding contrary to the terms of the note, that though made payable without reservation on a certain day, it was nevertheless not to be enforced till the plaintiff returned to the province or unless he sent a power of attorney to some one to collect the note.

This alleged agreement does not come within that class of cases in which parol evidence is admitted for the purpose of shewing that the note was given for the accommodation of the person suing on it, or want of consideration, failure of consideration, or illegality. I refer to the cases of Hoare et al v. Graham et al. (3 Campb. 57), Campbell v. Hodgson (Gow 74), Cuff v. Penn (1 M. & S. 21), Woodbridge v. Spooner (3 B. & Al. 233), Free v. Hawkins (8 Taunt. 92), Moseley v. Robinson (10 B. & C. 729), Foster v. Jolly, (1 Cr. M. & R. 703.)

Rule refused.

RENNETT ET UX. V. WOODS.

Arrest of married woman—Trespass.

A married woman living in this province on terms of separation from her husband, who was in Europe, was arrested for debt. It was not shewn that the creditor had any knowledge of her having a husband living. *Held*, that although the wife might be entitled to her discharge on application, the arrest under such circumstances would not support an action of trespass.

TRESPASS by husband and wife for assault and false imprisonment of the wife.

Pleas—1st. Not guilty.

2nd. That the plaintiff Anna Maria Rennett was not the wife of the plaintiff Hugh Percy Rennett. At the trial at Woodstock, before Burns, J., it appeared that the defendant Woods caused the plaintiff Anna Maria Rennett to be arrested on a *capias ad respondendum*, from the County Court of Perth, for a debt of £18 11s. 2d. It was proved that the plaintiffs were married in England in 1834; that Hugh Rennett, the husband, was in Europe; that he had been lately heard from; that the wife came to this country more than a year ago, having separated from her husband in consequence of disagreement, and receiving an annuity from him for her support. The debt for which she was arrested was incurred by her, for the board of herself and some of her children by a former marriage. It was sworn that the separation was intended to be permanent; that she had purchased things in this country in her own name as Mrs. Rennett; and it was not shewn that the creditor who sued her had any knowledge of her having a husband living. The learned judge considered that the arrest made under these circumstances was not illegal, and nonsuited the plaintiff.

Eccles moved to set aside the nonsuit.

Cur. adv. vult.

ROBINSON, C. J., delivered the judgment of the court.

We have no doubt that the nonsuit was proper, for the plaintiff had no right to sue in trespass for the arrest, being merely exempt from arrest (if at all) by reason of a personal privilege. In such cases the party arrested may obtain his discharge upon application to the court, but the arrest is not illegal so as to subject the officer or the plaintiff to an action. The authorities seem to entitle his wife in this case to be discharged on application, though she was living sepa-

rate from her husband at the time of the arrest, and had an allowance from him. But on the other ground—that arresting the wife under such circumstances was not a trespass—we think the nonsuit was proper, and refuse a rule.

Rule refused. (a)

SAGE V. DUFFY.

14 & 15 Vic. ch. 54—*Notice of action.*

A warrant to arrest the plaintiff was directed to one S. and all other peace officers of the county. The defendant was sworn in as a special constable to assist S., and he went alone, *not having the warrant with him*, and made the arrest. On action brought the jury found that the defendant believed he was acting in the execution of his duty. *Held*, therefore, that under 14 & 15 Vic. ch. 54 he was entitled to a month's notice of action.

TRESPASS for assault and false imprisonment. Plea—Not guilty, by statute.

At the trial at Woodstock before Burns, J., it appeared that Mr. Wallace, a justice of the peace, had issued a warrant against this plaintiff to one Stroud, a constable, to apprehend him, to answer for an assault which one Duffy (not this defendant) had complained of upon oath. Stroud found a difficulty in arresting him, and upon his representation to the magistrate this defendant was sworn in as a special constable to assist him in making the arrest. The warrant was directed to William Stroud, and to all other peace officers of the county.

The defendant and Stroud agreed that they would go next day to Woodstock to make the arrest. The day being stormy, Stroud, who had the warrant, did not go, but the defendant did, and meeting the plaintiff he arrested him, and took him before a magistrate. After the evidence was concluded, the learned judge desired the jury to consider whether they were satisfied or not that the defendant believed he was acting in the execution of his duty in arresting the plaintiff, and the jury found he did, and gave a verdict for the defendant on the ground that no notice of action had been given.

D. G. Miller moved for a new trial.

Cur. adv. vult.

ROBINSON, C. J., delivered the judgment of the court.

We think this a case in which the peace officer was entitled to the privilege of the month's notice. He knew that he had

(a) See 1 East. 16, *note*; *Cameron v. Lightfoot*, 1 W. Bl. 1190; *Tarlton v. Fisher*, 2 Dougl. 671; *Lofft*, 433.

been legally authorized to execute the process, and might very possibly be under the impression that he could take the offender, although the warrant was at the time in possession of the other constable. The jury having expressly found that he did believe he was duly executing the authority that had been given to him, puts an end to any doubt that could otherwise have been entertained. There is no question that the arrest was illegal, but that is no argument against the case being within the statute as to the necessity of giving notice of action. The ninth clause of our statute 14 and 15 Vic. ch. 54, is so plain as to leave no room for doubt in a case like this.

Rule refused.

REGINA V SPENCE ET AL.

Highway—Dedication—13 & 14 Vic. ch. 15 sec. 1.

One H. owned a block of land fronting on Elizabeth street, in Toronto, and running back to the centre of the block between Elizabeth and Teraulay streets. In laying out this land, he ran a street or lane of forty feet from Elizabeth street to the limit of his own property, which was not then enclosed or separated from the land adjoining; a short time after, and about seventeen years ago, M., the owner of the adjoining land to the east fronting on Teraulay street erected a fence to enclose his own land, running across the head of this lane. H. had nothing to do with the putting up of this fence, and there was no concert between him and M. as to the plan of survey or the laying out of their respective properties. G., owning land bought from M. abutting on the head of the lane, threw down the fence, so as to make a thoroughfare to his own premises; the defendants—occupying lots on the lane purchased from H., and contending that G. had no right to convert the lane into a thoroughfare to his own lot,—re-erected the fence a few inches west of the line of that pulled down; and thereupon G. procured them to be indicted for a nuisance in obstructing a public highway. A verdict of guilty was directed, subject to the opinion of the court under the facts above stated.

Held, that the jury should have been directed to find whether the lane, when first laid out, was dedicated by H. to the public as a highway generally, or whether, with reference to the statute 13 & 14 Vic. ch. 15, sec. 1, there was an express reservation of any right by him.

Robinson, C.J., dissenting and holding that the defendants were entitled to an acquittal on the ground that the evidence failed to shew any dedication by H. to the public beyond the limit of his own property, and that they were therefore justified in restoring the fence.

NUISANCE.—The indictment charged that the defendant on the 1st of October, 16th Victoria, in a certain lane leading from Elizabeth street, in the city of Toronto, to two certain tenements situate in the said city, one of which tenements was in the occupation of one John Gibson, and the

other in the occupation of one George Jeffers, such lane being the Queen's common public highway, used for all the liege subjects of the Queen, with their horses, carts, &c., to go, return, pass, repass, &c., at their will and pleasure—unlawfully erected and put up a fence, of the height, &c., and the same fence so made and erected in and upon the said Queen's common and public highway, there, from the said 1st of October till the day of the inquisition, &c., kept and continued, &c.; whereby the liege subjects of the Queen were not able to pass, repass, &c., with their horses, carriages, &c., in, through, and along the Queen's common and public highway aforesaid, as they ought, and were wont and accustomed to do; to the great damage and common nuisance of all Her Majesty's subjects, going and passing in, through, and along the Queen's public highway aforesaid.

The defendants were tried on this indictment at the assizes held at Toronto, before Robinson, C. J., on the 26th of May, 1852, and were found guilty; but judgment was deferred till the opinion of this court could be taken upon the point, whether upon the facts the defendants were guilty of unlawfully obstructing a public highway. The following case was stated by the Chief Justice, in accordance with the 14 & 15 Vic ch 13:—

C A S E .

“The original proprietor (Dr. Macaulay) of Park Lot No. 10, in the first concession of the township of York, many years ago, laid out the south side of it, fronting upon Lot street (now Queen street), into blocks of several acres each, divided from each other by streets of the usual width, running back from Queen street northerly. One of these blocks lies between Elizabeth street on the west, and Teraulay street on the east, and extends back seven hundred and sixty feet from Queen street, being three hundred and thirty six feet in width from Elizabeth street to Teraulay street. The east half of this block fronting upon Teraulay street, became the property of Captain Macaulay, who many years ago, enclosed it in rear by putting up a board fence along the centre of the block, on the dividing line between his land and that of his sister, the late Mrs. Hagerman, who had become the proprietor of the west half of the block, fronting upon Elizabeth street.

"Many years ago, but within twenty years, Mr. Justice Hagerman employed a surveyor to lay out the west half of the block into town lots, and that half was accordingly surveyed and laid out by itself quite independently of the east half of the block. The whole was divided into lots up to Captain Macaulay's boundary, and in the seven hundred and sixty feet, the length of the tract, there were three lanes each forty feet wide laid out, leading from Elizabeth street to that boundary. It was not proved at the trial whether, at the time of these lanes being laid out, there was any fence upon the limit between the two halves of the block, or not. It was not shewn or averred, that there was any community of ownership or connection in interest between Captain Macaulay and Mrs. Hagerman, or any power of control, or any concert between the proprietors of the respective halves of the block as to the plan of survey. The lane which is alleged to be obstructed by the defendants is the middle lane of the three. It was proved that as much as sixteen or seventeen years ago Captain Macaulay enclosed his half of the block by a board fence, separating his land from Mr. Hagerman's. About eight years ago, while this fence was up, one Gibson, and a Mr. Bugg, bought jointly from Captain Macaulay a part of his tract lying east and north of the land in question, and lately made a division between themselves, by which Gibson became the sole owner of a piece of land lying north and east of this land, and coming so far south as to be opposite to a portion of the head of the lane. There is not, and never was any street or lane leading through Captain Macaulay's land to Teraulay street, but Gibson claimed a right to open for himself a way into the forty foot lane in question, and pulled down so much of the fence which Captain Macaulay had put up as inclosed that portion of the head of the land which abutted upon his land, thereby making the lane a thorough-fare into his premises.

"The defendants possess land on the south side of the lane purchased from Mr. Hagerman; and objecting to its being converted into a thoroughfare, they complained to the representative of Mr. Hagerman's estate of this act of Gibson and in consequence of the latter threatening Gibson with legal proceedings he restored the fence, but in two weeks after took it down again, and then these defendants put up the fence which is now complained of, taking care not to encroach on the east side of the centre line, but building up the fence a few inches on the west side, and close up against the line of the old fence.

"The question is, whether the lane, which, as laid out, only led up to Mrs. Hagerman's land, could be converted

into a thoroughfare to the property beyond, at the pleasure of Gibson or the proprietors of the east half of the block : and if not, then, whether the putting up the fence by the defendants, *not precisely on the line*, but close up to it and across the head of this lane which has had public labor and money expended upon it as one of the streets of the city, is such a nuisance as is charged in the indictment."

(Signed) JOHN B. ROBINSON. C. J.

At the the trial the learned Chief Justice was of opinion that there was no evidence of any common public highway leading from Elizabeth street to the tenements of Gibson and Jeffers, as averred in the indictment ; in other words that there was no evidence of a dedication of the lane by the proprietor, Mr. Hagerman, to a greater extent than as regarded free access to and from the lots laid out by him on each side of it ; and that when the fence was pulled down, which for seventeen years or more had fenced the head of the lane separating his land from Captain Macaulay's, it was competent for his representative to enclose that which had been newly laid open, in order that the lane might not, against his will or the will of those who had purchased from Mr. Hagerman, be converted into a thoroughfare, which would frequently, perhaps generally, be regarded as a grievance by those who had built on each side of the lane.

In order, however, that the fact of obstruction might be found, he recommended the jury to find a verdict of guilty, which he told them would be subject to the opinion of the court upon the case which he should submit to them under our recent statute 14 & 15 Vic. ch. 13.

Wilson, Q. C., for the Crown.

Phillpotts, for the defendants.

The authorities cited are noticed in the judgments.

ROBINSON, C. J.—There was no contradiction in the testimony ; the facts were fully brought out, and the question that arises upon them is one of law—namely, whether, by any thing that was shewn, a public highway was established not only along and through, this lane, but beyond it into the premises adjoining, so that the owner of the soil over which the lane was laid out, or the owner of lands fronting on the

lane, were not at liberty to enclose the end of the lane in order to prevent its being converted into a thoroughfare.

The case of *Woodyer v. Hadden* (5 Taunt 125) is, in my opinion perfectly in point upon this question, and decides it in favor of the defendant, and upon principles which appear to be just and reasonable. The court, it is true, were not unanimous in their opinion. *Chambre, J.*, thought that under the circumstances of that case, which were very similar to the present, the owner of the land beyond or at the head of the lane could at his pleasure take down the fence or wall which had separated his land from the lane and could claim the right to go into, and use the lane as a public highway from his land, inasmuch as the party who originally laid out the lane through his own land had put up no bar or other obstruction to prevent the street from reaching to the extremity of his ground. If that had been done, he admitted it would have prevented the inference of dedication of the land as a highway to be used as a thoroughfare. Without it, he seemed to think that the way or lane which had been laid out, as this was, by the proprietor of the land through which it passed, in order to afford access to and from the premises which fronted upon it, must be regarded as a common public highway for all purposes into which people might enter at any point from their own ground that suited their convenience. His lordship founded his opinion very much upon what had been ruled by Lord Kenyon at *Nisi Prius* in a case of the *Rugby Charity v. Merryweather*, which is shortly reported in a note to *Daniel v. North* (11 East. 375).—Mr. Justice *Chambre* had, as he stated, been counsel in that case of the *Rugby Charity*, which may have given a bias to his mind upon the question, though his, no doubt, is an opinion which upon any point would always carry very great weight. The other judges who differed from him in *Woodyer v. Hadden*, seem however to have come very confidently to the opposite conclusion, and I do not find that the soundness of their decision has been questioned. The point there came up in an action of trespass for pulling down a fence which, as in this case, had been recently put up to close the lane, and *Mansfield, C. J.*, remarked that, exclusive of the plaintiff and defendant, the inhabitants of the houses

fronting upon the *cul de sac* or lane were to be considered,—that they might “perhaps like that this should be a public way; but certainly it is a very different thing to the inhabitants of a street, whether the street is public or private. The plaintiffs would have done a thing very wrong, if they had dedicated to the public the land of their street, in which their tenants have an interest, without the tenants’ consent. (page 134).

Heath, J., remarked, “If usage is evidence of dedication, how can you carry the dedication further than the usage? and the evidence does not prove an usage to pass on any further, only to the end and back again;” and Gibbs, J., considered that the owners of the land had a right to say that the land should not be used as a common highway, but only as an occupation way. That learned judge was so strong in his opinion that in the case before them there was not an user for such a length of time as to furnish evidence of dedication, that he rested his decision mainly on that ground, though we can at the same time see plainly enough what his opinion was upon the other question which is presented here: “I will not enter,” he said, “into the question whether such a street as this can or not be said to be so dedicated to the public, that a person having opposed such an obstruction as this to the passage of the subjects up to a certain time, can, after a time, withdraw that obstruction, and insist on a passage through from his own adjoining land, and use the street as a highway. There can be no doubt that if a man had erected a rail at the extremity of his land, against the land of another, he might thereby restrain others from passing; if he had drawn a thread there, it would have done; but why it should be necessary to put a rail or anything there at all, is what I cannot understand.” “No fact in this case,” said Mr. Justice Heath, “shews that the owner meant to give the public any right over this land, beyond a right of passage to the respective houses.”

Mansfield, C. J., held that what was shewn did not amount to a dedication, by which he could only have meant that there was no dedication of any further right than pas-

sing and repassing along the lane to and from the houses. "A person," he said, "lets land to other persons, who build houses on building leases, which is just the same thing in effect as if he had built them himself; a few houses are built first, and the work proceeds until they are built up to the defendant's ground. There must be a way to these houses, and the carts and carriages which went there went only to these houses, and could go nowhere else, because of the wall at the end. Now it is admitted, that if the plaintiffs themselves had built another wall at the extremity, their rights would have been safe; but what difference could that have made as to the use of the street? persons could still go to the end of it, and that wall would not have interfered with them."

In another passage of his judgment, his lordship says, "It is a different question, whether, if there had been at an early period any intimation of an intention of the defendant to pull down his fence and make a thoroughfare to the end of the world, it would have been incumbent on the plaintiffs, in order to prevent the public right from attaching, to put up another fence; but no such notice having been given, I do not think it was necessary for the plaintiffs so to do. It is insinuated that this was an attempt of the plaintiffs to extort a sum for passing over this way; but I think the plaintiffs would not act handsomely, if legally, if for any price, without the consent of their tenants, the inhabitants of these houses, they should agree to its becoming a public way; for there are many conveniences attending a private *cul de sac*, of which, having so let it to them, the lessors have no right to deprive them."

In the case now before us, these defendants, the occupants of the houses fronting on the forty feet lane, were, I believe, not lessees, but vendees; but the remark last cited from the learned Chief Justice's judgment, would not apply with less force on that account. Their rights as vendees would not be less valuable, and they would have the same right to reckon upon the continuance of the state of things which they saw existing. When Mr. Hagerman laid out this lane as a passage way for the use of his intended tenants or lessees, he carried it up, not to any other street or passage which con-

nected it with any other point, but up to the adjoining property of Capt. Macaulay, in other words, to the limit of his property, which, for all that appears, may not have been enclosed at the very time of this lane being laid out. How that was does not conclusively appear. The fence which Captain Macaulay did put up, and which Gibson and some others owning land beyond the lane have lately pulled down, was proved to have been up about seventeen years.

The laying out the lane was, as I gathered from the evidence, a short time before that; and whether the fence put up seventeen years ago was the first that had divided Captain Macaulay's land from Mr. Hagerman's, was not shewn. I assume that it was, and that when the lane was laid out, there was not, and had not been any division fence between the two tracts—I think it is immaterial how that was. The law surrounds every man's property with an invisible wall; and Mr. Hagerman could no more give to the public the right, or the semblance or expectation of a right, to pass out of his land into Captain Macaulay's, than he could have done if there had been a wall between them. He cannot, therefore, be supposed to have intended the dedication of any such right to the public. Then there is no doubt that seventeen years ago there was a fence put up by Captain Macaulay, which at least, was a plain assertion by him of what was acquiesced in always afterward by Mr. Hagerman and his tenants and vendees—that there was no right of way or passage beyond. It was while this way was thus blocked up at the end that the prosecutors of this indictment, who now insist on a right of thoroughfare, acquired their rights, and that most, or many of the vendees of Mr. Hagerman, probably, if not all of them, acquired their rights. The fact of suffering the lane to be closed at the head for sixteen or seventeen years, joined to the fact that there never had been a way or passage beyond, seems to me to repel all idea of such a dedication as is contended for. It speaks plainly as to what was meant to be given up to the public—namely, a right to pass along the lane backwards and forwards, and nothing more.

In the case of the Queen v. Chorley (12 Q. B. 515), which brought up a question resembling the present, but only to a

certain extent and under a different modification, the language of the court has a strong bearing upon this case. There was a lane or passage-way there adapted only to foot passengers, though a cart could barely pass. The defendant, however, had for many years been in the habit of driving carts along it, to and from a malt-house owned by him, which was at the head of the lane ; and it was complained that this use made by him of the lane was a nuisance to the right which the public were alleged to have acquired to use it as a foot way. The question was, which was the elder right in point of time, and whether the right to use the foot way could be taken to have been extinguished or abandoned. Lord Denman said that, as an express release of the easement would destroy it at any moment, so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect, without any reference to time. For example, this being a right of way to the defendant's malt-house, and the mode of user by driving carts and waggons to an entrance from the lane into the malt-house yard, if the defendant had removed his malt-house, turned the premises to some other use, and walled up the entrance, and then for any considerable time acquiesced in the unrestrained use by the public, we conceive the easement would have been clearly gone." Now here, it is certain that very soon after this lane was laid out it was closed at the end ; the public had never enjoyed any right of passage beyond it, such as is now claimed, before the fence was put up. There was no evidence of such user whatever ; and now, after the fence has been up seventeen years, certain individuals claim a right which the public had never enjoyed, of passing out of the land which had been so long separated by the fence into the lane ; and they complain of that as an illegal obstruction which merely restores things to their former state. I attach no importance to this fence not being on the exact line of Captain Macaulay's land. The defendants resolved not to place it where they could have no right to place it, and therefore took care that the fence should be clearly on the west side of the division line, and not encroaching on Capt. Macaulay's land. It thus shuts up an inch or two

that had been open while the other fence stood, but the same objection might have been raised in *Woodyer v. Hadden*. The prosecutors in this case did not on the trial or in the argument, rely upon any fine-spun objection of that kind; and could not, in my opinion, have done so successfully. The fence was sworn to have been put up close against the other.

What was said by Lord Ellenborough, in the case cited on the argument, of *Rex v. Lloyd* (1 Campb. 260), does not conflict with the judgment of the Court in *Woodyer v. Hadden*, because there the defendant took upon himself to stop up a passage which had been long used and enjoyed. Lord Ellenborough held he could not, although it was no thoroughfare; for that there might be a public way which was not a thoroughfare. That case would have applied, if these defendants had put their fence across the lane in the middle or at the entrance, and not (as they did) at the head, where there had never been a passage.

In *Barraclough v. Johnson* (8 A. & E. 99), it was held that there can be no dedication without an intention to dedicate; and there is nothing in the present case from which an intention could be inferred to confer any further right than to pass along the lane to the end, not through and beyond the end; and this right has not been interfered with. The case of *Wood v. Veal* (5 B. & Al. 454), strongly supports the case of *Woodyer v. Hadden*, and Best J., in that case says expressly that he can see no reason why the inhabitants on a street which is not a thoroughfare should not put up a fence at the end of it and exclude the public." If by that observation the learned judge meant that those inhabiting upon such a lane might exclude the public from the entrance into it, though it had been long open, and might control the use of it by confining it to their own purposes, the opinion goes much further than is necessary for determining the question before us, and could not easily be reconciled with what has been said in other cases; but that they may prevent its being used against their will as a public thoroughfare by persons assuming a right to make a way into it at the head, where it had before been closed, and where no passage had been ever granted or used, is what is determined in *Woodyer v. Hadden*.

and on the authority of that case I am of opinion the evidence does not support the conviction, and that our judgment should be for the defendants.

The question brought up by this prosecution has appeared to us to be one of no little interest to the public, and involving some difficulty. We have not been able, indeed, to come to an unanimous conclusion upon it.

I have expressed only my own opinion ; I understand my brother Burns to be much influenced in his view of the case by a recent statute, 13 & 14 Vic. ch. 15, sec. 1, which I think either escaped the attention of all parties at the trial, or possibly was not considered as material to the question. My learned brother will state his impression in that respect, which I believe is to the effect that unless the proprietor of the land, when he laid out a lane of this description, reserved to himself some right which would be inconsistent with the further extension of the road, it becomes now, under that statute, a common highway ; and that the enquiry at the trial should therefore have been whether there was any such reservation. For the want of attention being given to that question, it appears to him, I believe, that we ought not to allow judgment to pass upon the verdict of conviction, but should leave the prosecutors to prepare another indictment if they choose to persist. If that shall be done, it will become necessary to consider the effect of that statute. At present I am not clear that it does more than make the road a common public highway, though it may at first have been intended merely for the accommodation of those residing on it. The effect of that would be that the public would have the same right to use it as the occupants of the lots fronting on the lane, and it could therefore not be obstructed at the entrance, or in any part of its course. In other words, the public would have a right to go wherever those occupants could go, and to use it as fully for all purposes. It would still remain a question whether they would have any better right to insist upon its being left open at the termination than the occupants would have if no such act had been passed. At present that is a question which seems to me to admit of doubt. If the proprietor who laid out this lane had placed

a fence, or, as the courts have said in a similar case in England, had put a thread across the end of the land, and especially if this thread had been an inch or two within his own boundary, there could have been no pretence for the public claiming a right under this statute, any more than at common law, to pass beyond that. The only consequence of the statute would be to make the lane a common public highway, into which all persons would have a right to enter by any public thoroughfare that led into it. But I do not see clearly, though I may come hereafter to that opinion, that there was any occasion to place a barrier at the limit of the proprietor's estate to denote such intention, since no right to go beyond could fairly be understood to have been given in the first instance, when the lane only led up to the adjoining private property; and I doubt yet the right of any one to break through the barrier with which the law surrounds the property of every one, by pulling down the fence which had stood as the actual boundary for seventeen years.

DRAPER, J.—Upon the facts of the special case, as appearing in evidence, I have no doubt the verdict of guilty is right, taking things rigidly; for the fence, which is the nuisance complained of, is stated by one witness to be *on the lane*, ten or twelve inches from the line dividing the property formerly owned by the late Mr. Justice Hagerman from that formerly owned by Captain Macaulay. The evidence of dedication to the public up to this division line appears clear and conclusive. The fence, placed where it is, is, therefore, strictly speaking, a nuisance. But the parties are, it seems, desirous of taking the opinion of the Court, whether the dedication of the lane up to the limit between Mr. Justice Hagerman's property and that of Captain Macaulay, can upon the whole evidence be treated as a limited dedication—*i. e.*, a dedication which still left a right in Mr. Justice Hagerman to erect and continue an obstruction on the very line between himself and Capt. Macaulay, in the same manner that he might before the dedication have erected and continued a line fence between them.

I am not sure that this question can, strictly speaking,

be considered as open on this indictment and evidence; I incline rather to think it is not, and that the court may, in the exercise of their discretion, abstain from pronouncing upon it.

His Lordship the Chief Justice is of a different opinion, from the understanding which took place at the trial before him. I shall therefore not abstain from entering into the matter.

On the threshold of the inquiry I meet with a difficulty on a question of fact. From the evidence I gather that when the lane was opened and dedicated to the public, the dedication up to the extreme limit of Mr. Hagerman's property was complete; there was no reservation expressed: in other words, Mr. Hagerman dedicated a lane as far in point of extent as his right of property extended. As I understand, there is no proof of a fence existing on the limit at the time of the dedication; afterwards a fence was erected by Capt. Macaulay at the eastern extremity of this lane, enclosing his property from it. Of his right to put up this fence there is no doubt; but it is not suggested that Mr. Hagerman was in any way a party to this act, nor that it was put as a fence between two proprietors of conterminous lands. Under this evidence a jury ought, I think, to be directed that they might find a dedication or dereliction of a right of way to the public to the terminus of Mr. Hagerman's property, although there was no thoroughfare. The case of the Trustees of the Rugby Charity v. Merryweather, reported in a note to 11 East. 375, seems conclusive to this extent. The authority of this case is shaken by the language of the judge in Wood v. Veal (5 B. & Al. 454), though the decision of this latter case rests on the absence of evidence of dedication by the owner of the fee, the property having for ninety-nine years been under a lease. Still doubts are thrown on Lord Kenyon's opinion, that there may be a highway which is no thoroughfare; and Best, J., says—"If the road be for the accommodation of particular persons only, it is not a public road; and therefore I can see no reason why the inhabitants in a street which is not a thoroughfare should not put up a fence at the end of it, and exclude the public." However, no judg-

ment is given on the point. The Rugby case is also shaken by the decision in *Woodyer v. Hadden* (5 Taunt. 125); the facts of which, in very many particulars, closely resemble the facts in the present case. There are only two differences which are at all material: one, as to the existence of a fence severing the two closes at the time the street was first laid out; and the other, as to the street being in an incomplete state. *Chambre, J.*, held that there was even there sufficient evidence of dedication, but the other judges were of a contrary opinion; and *Sir James Mansfield, C. J.*, because the street was not paved, held it to be unfinished, and therefore that it never was dedicated to the public; and he adds, "I do not know that if it were a public street perfected that it is therefore a public way for all purposes;" and he lays stress on the rights of the occupiers of the houses not to have a *cul de sac* converted into a thoroughfare. In that case the plaintiff, the owner of the land, had erected a wall, very much as these defendants have erected this fence, a few inches from the line between his land and the defendant's land adjoining; but it was held he might do this, in the absence of evidence of any dedication of the land for a highway over the spot on which the wall was erected.

In determining how this question should be submitted to a jury, the case of the *Marquis of Stafford v. Coyney* (7 B. C. 257) is to be borne in mind, as well as that of *Barraclough v. Johnson* (8 A. & E. 99). The intention of the owner of the soil is to be considered; and if he meant no more than to give to the inhabitants of the houses on this lane, and those who had occasion to go to them, the permission to use the lane, it would afford proof of license (possibly revocable) to these particular parties, rather than of dedication to the public. Such a permission, limited to particular parties, would not create a public highway (*Poole v. Huskinson*, 11 M. & W., 827). In connection with the other evidence, attention should, however, be specially directed to the user as it in fact has been, to the absence of any act of interruption by the *owner of the soil*, and to the manner in which the city authorities have publicly treated this lane, as by levelling, making sidewalks, &c.; and from the whole the jury are to say if there was an *ani-*

mus dedicandi,—If they negative this, then there is no highway at all, and, as a consequence, no nuisance.

The case of the Grand Surrey Canal Company v. Hull (1 M. & Gr. 392) is a very strong authority to shew that the question of intention of dedicating is for the jury: and if there be evidence of such intention it must be left to them. The Queen v. East Market Tithing (11 Q. B. 877) is to the same effect, so far as leaving the evidence of dedication to the jury. But in these latter cases it is of some importance to perceive that the case of Rex v. Lloyd (1 Campb. 260) is cited as authority; and what Lord Ellenborough says there goes a long way to establish that here the evidence would support a finding of a dedication to the public of a right of way. He observes: "To say that this right cannot exist because a particular place does not lead conveniently from one street to another, would go to extinguish *all highways where* (as in Queen Square) *there is no thoroughfare* If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public.

Now I do not see how, without assuming the functions of the jury, we can dispose of this question. We cannot, I apprehend, grant a new trial, as was done in the case of Regina v. Chorley (12 Q. B. 515), for there it is evident the indictment had been removed into the Court of Queen's Bench by *certiorari*, and was tried on the civil side. Perhaps we might suspend judgment so as to allow a new indictment to be preferred, when the jury, by their finding, can determine the question. At present I can only say I think there is abundant evidence on which they might find a dedication to the public; and, if found generally, the defendants would be guilty of a nuisance, under the circumstances stated.

There is no suggestion made that since the survey of this block of land into lots by the late Mr. Justice Hagerman, the plan of the survey has been lodged with the registrar of the County of York, pursuant to 9 Vic. ch. 34, sec. 33. Probably the lots had been sold off before that act passed, and there was no inducement to file such a plan. But the

provisions of a later statute may, it seems to me, materially assist in determining this question; and (as in the case of *The Queen v. Purdy*, decided by us last term, (a)) neither at the trial, nor on the argument was the attention of the court called to this enactment. The 12 Vic. ch. 35, sec. 41, recites that many towns and villages have been surveyed and laid out by companies and individuals, and by different owners of the lands, and lands have been sold therein according to the plans thereof; and enacts, "that all allowances for roads, streets, and commons, surveyed in such towns or villages, and laid down on the plans, and upon which lots fronting on and adjoining such allowances for road, &c., have been sold to purchasers, shall be public highways, streets, and commons; and lines, courses, posts, and monuments run, given, placed or planted, in the first survey, to designate or define any such allowances, are declared to be unalterable." The 42nd section makes it the duty of the original owner of the land forming the site of any such town or village to deposit a plan thereof in the proper registry office, under a penalty. The 34th section of the same act recites, that many townships, tracts or blocks of land in Upper Canada were granted by the Crown before surveys were made therein, and were afterwards surveyed by the owners; and it provides, as to such surveys, that the surveys by the grantees shall be deemed the original surveys, &c.

The *locus in quo* was not part of the town of York as originally laid out by Government, but was part of park lot No. 10, in the first concession of York, and was included within the limits of the City of Toronto by the 4th Wm. IV., chap. 23. It was granted by the Crown as a park lot, lying in the township of York, and had its metes and bounds assigned to it in the original survey. Strictly speaking, therefore, this subdivision of this portion of a park lot, afterwards included by act of parliament within city limits, does not come within the terms of any of the foregoing statutory provisions; but with such an expression of the will of the legislature before us—that streets, &c., laid out by private persons in villages or towns on their own private property, shall, wherever lots have been sold fronting thereon, be public highways—we may, I think, very

safely infer that, had their attention been drawn to it, such an enactment would have been then extended to a case like the present. The 13th & 14th Vic. ch. 15, sec. 1, vests in the municipal corporation of each city and incorporated town the right to use as public highways all roads, streets, and public highways, within the irrelative limits, except in so far as the right of property, or other right in the land occupied by the same highways, may have been *expressly reserved* by some private party when it was first used as such road, street, or highway; and make such municipal corporation answerable for the repairs.

Looking at these enactments, I feel fortified in the opinion that, before we should pronounce on this as a question of law, the question of dedication, or of right reserved by the owner of the land when the lane was laid out, should be expressly found upon by a jury; and for that reason I think judgment on this indictment should be withheld; but while I do not think the ends of justice call for a sentence upon a conviction, on a rigid consideration of whether the fence may not be, by a few inches, an encroachment on a public right, I am not at all prepared to say the defendants are entitled to an acquittal on the merits. As to the indictment itself there is no objection in point of form, and the only objection really is, whether the defendants have been properly found guilty. In rigorous construction, I should feel bound to say they have; but for the reason given I should think judgment against them should not now be given.

BURNS, J.—I am of opinion that we have not sufficient appearing upon the case to enable the court to give judgment. It appears to me the effect of the statute 13 & 14 Vic. ch. 15, sec 1, is, with respect to cities and incorporated towns, to alter the law respecting dedication by proprietors. I take it that now all roads and streets which were laid out at the time of the passing of that statute become the property of the municipal corporation of the city or incorporated town, unless the right of property, or right in the land occupied by the same highway, shall have been expressly reserved. The words of the act are "that the right to use as public highway all roads, streets, and public high-

ways within the limits of any city or incorporated town in this province shall be vested in the municipal corporation of such city or incorporated town ; and such roads, streets, and highways shall be maintained and kept in proper repair so long as they shall remain open as such, by and at the cost of the corporation, whether they were originally opened and made by such corporation or by the government, or by any other authority or party." The exception is this, "except in so far as the right of property, or other right in the land occupied by the same highway, may have been expressly reserved by some private party, when it was first used as such road, street, or highway."

It appears to me that the legislature intended to do away with the question of dedication in cities and incorporated towns, and at once to render all the roads laid out public highways for the use of the inhabitants, unless there had been an express reservation. If this be the true view of the law, then the jury has expressed no opinion upon that point, and indeed they could not have been asked to do so, for the act appears to have escaped attention. The evidence given at the trial was not adduced with that object in view, but was rather taken upon the point whether it was to be considered that Mr. Justice Hagerman had or not so dedicated his land up to the boundary adjoining Capt. Macaulay's land, as that it would confer a right upon Capt. Macaulay, or those purchasing from him, to continue on the street through his lands. On the question of reservation, it will be a point whether Mr. Justice Hagerman did or not give his land all the way to his boundary line for a road. If he gave his land all the way to the boundary line without reservation then no party can, as it appears to me, place any obstruction upon any part of it without being subject to some liability. A public highway may exist over a place though there is no thoroughfare. *Poole v. Huskinson* (11 M. & W. 827) ; *Bateman v. Bluck* (21 L. J. Q. B. 406.)

The effect of vesting the road in the corporation for the use of the public, is to confer a right upon the public to complain of any obstruction in the use of it ; and therefore, if there be no reservation to the proprietor, the complaint by

indictment is proper. In *Woodyer v. Hadden* the plaintiff complained that the defendants had no right to use the highway as a *public highway*, and that what had been done did not confer upon the defendants any right to use the place as a public highway, as against the proprietor of the soil. In the case before us I understand the effect of the statute to be, that as to all roads which may have been laid out, no matter by what authority or party they may have been so laid out, the right to use them as public highways is given, except in so far as the right of property, or other right to the land occupied by the same highways, may have been expressly reserved by some private party when the road was first used as such road. The case was not presented to the jury, neither has it been argued before us with reference to the effect of the statute 13 & 14 Vic. ch. 15; and, as the construction which I have put upon the act seems to me the true one at present, I see no other alternative than to suspend pronouncing any sentence, and let the parties proceed to a fresh indictment.

Judgment arrested.

WANNACOTT V. FILLATER.

Dower—Evidence of seisin.

DOWER: *Held*, that the evidence stated below was insufficient to establish the husband's seisin, which was denied on the pleadings; but on the affidavit filed the court granted a new trial on payment of costs.

DOWER.—Pleas: 1, denying the marriage; 2, denying the seisin of the demandant's husband.

The point to be considered was, whether the demandant gave sufficient evidence to warrant a verdict in her favor on the issue upon the plea denying that her husband was seised during coverture.

At the trial at Belleville, before Burns, J., the evidence was to this effect:—It was proved by one witness, a sister of the demandant's husband, that he had been in possession for about a year of the premises in which dower was demanded, but she explained that what she meant by his being in possession was that a third party was holding the

land under him. It was not proved that the husband died in possession, or had ever indeed been in actual possession himself; and the nature of the occupation of the person who was sworn to have been in possession under him was not shewn, nor how he entered, nor how long he held, nor when or why he ceased to occupy. Then the demandant called the registrar of the county as a witness; and he produced a memorial of a deed of bargain and sale, purporting to have been executed by one Frederick to the demandant's husband during the coverture, and conveying this land to him in fee. This memorial was signed by Frederick, the grantor. A notice to produce the deed had been served on the defendant Fillater. A son of the demandant's husband was called, who swore that he was executor of his father, and that there was no deed of that kind among his father's papers. The execution of the memorial by Frederick was proved by a subscribing witness, who swore that, as he had sworn to the execution of the deed also for the purpose of registry, he presumed he must have seen it duly executed.

It was objected on the part of the defendant that there was no such evidence of the loss of the alleged deed as could let in secondary evidence, and that if there had been, still the secondary evidence given of the deed was insufficient; and that, at any rate, the fact of Frederick having made such a deed would not establish Wannacott's seisin, for it was not shewn what right Frederick had to make the conveyance, nor even that he was in possession at the time of his making it, though there was some vague testimony of his having been at some time in possession. It was not shewn that the defendant Fillater had taken any title from Wannacott, the husband, nor by what right he claimed to hold.

The learned judge thought the husband's seisin not sufficiently shewn for the purpose of this action, and directed a verdict for the defendant, with leave to the plaintiff to move to set aside the verdict and enter a verdict in his favor, if this court should think the seisin sufficiently proved.

Vankoughnet, Q. C., shewed cause against a rule *nisi* obtained in pursuance of the leave reserved: he cited *Johnson et ux. v. McGill*, 6 U. C. R. 194. *Hagarty*, Q. C., contra.

ROBINSON, C. J., delivered the judgment of the court.

Without determining upon how slight evidence of title a demandant in an action of dower may be allowed to succeed upon the issue denying the husband's seisin, we consider that the evidence given in this case was not sufficient. But on the affidavit we are inclined to take the course which we should, perhaps, even without it have taken, and to grant a new trial, as was done in the case of Johnson and wife v. McGill (6 U. C. R. 194), rather than allow the demandant to be finally concluded by the verdict which has been rendered for the defendant.

The case of Lockman v. Ness, in this court, was cited. It was decided in Easter Term, 1837, and is not among those printed, but I have referred to my note of it. There the evidence was, that the husband had been during coverture in actual possession of the land, and had continued so possessed until he made a conveyance of it to another person. Whether the defendant in the dower case claimed under that other person is not stated, but there was at least the fact that the husband was in actual possession claiming the fee : and a note was referred to, which is appended to one of the precedents in Wentworth's Pleadings, 10th volume, page 161, in which it is stated to have been held by Mr. Justice Buller, that evidence of actual possession by the husband is sufficient *prima facie* on such an issue in dower, for the seisin in fee will be presumed from it.

In the present case, however, there was no proof that the husband was ever in possession apparently claiming as owner, or that he was ever in possession at all. The evidence that some man had been once in possession under the demandant's husband, was too vague and unsatisfactory. It may be indeed that the defendant claims under a title derived from the husband, and if that were shewn it would remove all difficulty. The affidavit alleges that the defendant had made proposals to settle this action, and that the plaintiff was taken by surprise by being put to proof of the husband's title, which he did not suppose would be denied. Upon these facts we grant a new trial on payment of costs.

Rule absolute.

JONES QUI TAM V. KETCHUM.

Penal action for usury—16 Vic. ch. 80.

Before the passing of 16 Vic. ch. 80, a *qui tam* action was commenced under 51 Geo. III. ch. 9 sec 6, for taking an illegal rate of interest.

Held, that the suit could not be continued, for by the first mentioned act the court had lost the power of giving judgment for the penalty; but *semble*, that contracts prohibited by the former law must still be held void.

This was a *qui tam* action of debt, under the statute 51 Geo. III. ch. 9, for taking an illegal rate of interest on a loan. The defendant demurred to the declaration, on the ground that there is no law or statute of the province in force whereby the defendant is liable to the penalty sued for in this action, even if he were guilty of taking the usurious interest as therein alleged.

Sidney Smith for the demurrer. *Wilson, Q. C.*, contra.

The authorities cited are noticed in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

There was a formal exception taken to the declaration in this case on account of the omission in the conclusion, of the words, "and therefore the plaintiff, as well for our lady the Queen as for himself, brings his suit, &c.;" but we think the defendant did not persist in this objection, and at any rate there is nothing in it. It sufficiently appears in the declaration that the plaintiff is suing for the Queen as well as for himself. *Walter v. Laughton* (10 Mod. 253) is in point against the exception.

The substantial question is, whether an action on the statute 51 Geo. III. ch. 9, sec. 6, can now be maintained since the passing of our late statute 16 Vic. ch. 80. That act was passed on the 24th of March, 1853, and recites that "it is expedient to abolish all prohibitions and penalties on the lending of money at any rate of interest whatsoever, and to enforce, to a certain extent, and no further, all contracts to pay interest on money lent;" and it enacts that the sixth section of the statute 51 Geo. III. ch. 9, shall be and the same is thereby repealed. It is under the sixth clause alone that the penalties now sued for can have been incurred, and there is or was nothing but that clause that could sustain such an action as the present.

The declaration states the receipt of the usurious interest to have taken place on the 14th of February, 1852, which

was before the repealing act was passed; and it alleges the usurious contract to have been made on the 14th of March, 1850.

The question then is, whether the penalty which was incurred before the repeal of the prohibitory act can be sued for after such repeal; or, rather, whether the suit can be carried on after such repeal, for the writ is stated to have issued on the 10th of August, 1852, so that the suit was commenced some months before the passing of the last statute.

In this last statute the repealing clause is followed by an enactment "that no contract *to be hereafter* made in any part of this province for the loan or forbearance of money or money's worth, at any rate of interest whatsoever, and no payment in pursuance of such contract, shall make any party to such contract or payment liable to any loss, forfeiture, penalty, or proceeding, civil or criminal, for usury, any law or statute to the contrary notwithstanding;" but that any such contract or security shall be void only so far as relates to any excess of interest above six per cent.

And then follows a clause "that nothing in this act shall be construed to apply to any bank or banking institution, or to any insurance company, or to any corporation or association of persons heretofore authorized by law to lend or borrow money at a higher rate of interest than six per cent. per annum.

In *Stevenson v. Oliver* (8 M. & W. 241) Parke, Baron, says, "There is a difference between temporary statutes and statutes which are repealed; the latter (*except so far as they relate to transactions already completed under them*) become as if they had never existed."

The same law is laid down in *Simpson v. Ready* (11 M. & W. 346), and more distinctly in *Morgan v. Thorne* (7 M. & W. 400), and in *Charrington v. Meatheringham* (2 M. & W. 228), *Warne v. Beresford* (2 M. & W. 848), *Regina v. McKenzie* (Russell C. C. 429), *Miller's case* (1 W. Bl. 451), *Kay v. Goodwin* (6 Bing. 576), *Maggs v. Hunt* (4 Bing. 212, S. C. 12 Moore, 357), *Surtees v. Ellison* (9 B. & C. 750, S. C. 4 M. & Ry. 586), *Phillips v. Hopwood* (10 B. & C. 39), *Worth v. Budd* (2 B. & Ad. 172.)

In *Kay v. Goodwin* (6 Bing. 576), Chief Justice Tindal

says: "I take the effect of repealing a statute to be to obliterate it as completely from the records of parliament as if it had never passed, and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and *concluded* while it was an existing law."

Lord Tenterden lays down the same principle as strongly in *Surtees v. Ellison* (9 B. & C. 752), and adds, "that is the general rule, and we must not destroy that by indulging in conjectures as to the intention of the legislature."

In several of these cases the proceedings had been commenced before the repeal of the statute, as in this case; but it was held, nevertheless, impossible to proceed under a statute no longer in existence, (and especially for the purpose of enforcing any penal provision.) There is nothing, we think, in the second clause of the new act, which would warrant us in holding that the penalty can be now enforced; for we are called upon by this declaration to give an active force to the repealed law, by pronouncing judgment for a penalty and distributing it according to that statute. This would be wholly inconsistent with the language and decisions of the judges in the cases we have cited, where no saving has been inserted in the act as to proceedings already commenced.

It is quite another question, whether, notwithstanding the repeal of the former law, contracts which were prohibited and made void by it while it was in force, must not still be held void. The second clause of the statute lately passed shews this, we think, to have been intended.

What the legislature understands to be the effect of the absolute repeal of an act where no saving is inserted as to the effect of such repeal, is clearly shewn in many statutes; among others by 14 and 15 Vic. ch. 54 sec. 1, where, in repealing several statutes in language such as has been used in the one now before us, the legislature directs that they shall be thereby repealed, "*except as to any action, suit, or proceeding, which has been commenced or prosecuted before the passing of this act.*"

The *Queen v. the Inhabitants of Mawgan* (8 A. & E. 496) is decisive of the question in this case. We may say, as the

court there said, that we have little doubt that the legislature may have meant such prosecutions to go on, but they have not said so; and that, the statute being repealed in unambiguous words, we have lost the power of giving judgment for the penalty.

Judgment for defendant on demurrer.

CROMBIE V. OVERHOLTZER.

8 Vic. ch. 45.

A note given on account of a sale made on Sunday is not void in the hands of an innocent holder for value.

ASSUMPSIT, on three several promissory notes, by the indorsee against the maker.

Plea—that the notes were made and given by the defendant for the price of certain lands sold and conveyed by the payee to the defendant, and that the said sale was made and the notes given on Sunday, contrary to the statute, &c.

Demurrer,—because the facts stated in the plea form no defence to this action.

Cameron, Q. C., for the demurrer.

ROBINSON, C. J., delivered the judgment of the court.

We take it to be clearly settled that when a statute does not provide that all securities shall be void which shall be made in furtherance of such dealing as the statute prohibits but merely prohibits the act, or even goes further and imposes a penalty, such a statute has not the effect of making void, in the hands of an innocent holder for value a negotiable instrument, which was made in furtherance of such a transaction. This was the distinction always made between the statutes against usury, which expressly made the security void, and many other statutes, until the legislature interposed and relieved the innocent holders of negotiable instruments created in furtherance of an usurious agreement. The statute 8 Vic. ch. 45, makes void all contracts of sale made on a Sunday; but that effects merely the consideration for this note itself. This plea relies on the bare fact the transaction out of which this note arose was illegal as between the original parties, without averring anything that might make such a defence available against this plaintiff, an innocent holder, for all that appears, for value.

Judgment for plaintiff on demurrer.

PARIS & DUNDAS ROAD COMPANY V. WEEKES ET AL.

Action by Road Company for tolls—Evidence of incorporation and of defendants joint liability.

Action by Joint Stock Road Company, incorporated under 12 Vic. ch. 84, against stage proprietors, for tolls—The plaintiffs proved that the defendants had used the road with their stage coaches, and had paid tolls: that in former negotiations for settling this claim they had acted as recognizing a joint liability; that the advertisements put out by them were of a joint concern; and that their horses were employed over the whole road indifferently, and one fare only taken for the whole route, though among themselves the line was divided into portions, and the fares distributed accordingly.

Held, that the defendants' joint liability, and the incorporation of the plaintiffs, were sufficiently shewn.

The plaintiffs declared that the defendants on the 1st of February, 1853, were indebted to them in £83 14s. 8d., for tolls due by the defendants for the use of the plaintiffs' road, and on account stated.

The defendant Kennedy pleaded—1. *Nunquam indebitatus*.

2. A plea, demurred to.

3. That there is not, and never was, such a corporation as the supposed company in the declaration mentioned.

The other two defendants pleaded *nunquam indebitati*.

At the trial at Hamilton before Burns, J., it was contended that the plaintiffs must give evidence of the act of incorporation, or rather of all being done that is necessary under the general road company statute, 12 Vic. ch. 84, to entitle the plaintiffs to act as a corporation and to sue as such. It was proved that the defendants had used the road with their stage coaches through the whole of the year 1852; that one of the defendants had paid tolls to the plaintiffs for a period before this, and that the other defendant had paid tolls for carriages employed in transporting goods, and only objected to paying tolls on the stages because they were at the time carrying the mail, and a case of these plaintiffs against Babcock was then pending in this court, in which it was to be determined whether that circumstance would exempt the stage proprietor from tolls (*a*). The learned Judge considered that the facts proved sufficiently shewed the plaintiffs to be a corporation *de facto*, and recognized as such by the defendants, to support the plaintiffs' right to sue *primâ facie*. It was denied by the defendants that they were partners; and they attempted to

(a) Now reported, vol. x, page 335.

shew that they individually had an interest in, and were managers of, the business for several and distinct portions of the road between Hamilton and Woodstock, and that they had no common interest. On the other hand it was proved that during former negotiations for settling this claim the parties acted as recognizing a joint liability, and never till lately made objection on the ground that they were not partners; and, further, that the horses of all the defendants were employed over the whole road indiscriminately, and that the advertisements put out by the defendants were of a joint concern; though among themselves the road is divided into portions, and the fares divided accordingly, yet but one fare is taken for the whole route.

It was left to the jury to find whether upon the evidence the defendants were partners or not; and the jury found that they were, and gave a verdict for the plaintiffs, and £83 14s. 8d. damages.

Eccles moved for a new trial on the law and evidence, and for misdirection,—he referred to 12 Vic. ch. 84; *Regina v. Haystead*, 7 U. C. R. 9.

ROBINSON, C. J., delivered the judgment of the court.

We think the evidence supported the finding of the jury as regarded the joint liability; and that there was such a recognition by the defendants of the company being entitled as a road company to charge and collect tolls, as to throw it upon the defendants to shew that by reason of something done or omitted by them they were not in fact entitled to sue as a corporation under the statute.

Rule discharged.

HAYNES V. SMITH.

Taxes—Incumbrance—Damages.

Taxes due upon land at the time of sale are an incumbrance within the covenant for the quiet enjoyment; but the plaintiff can recover only the sum due for arrears at the date of the conveyance.

COVENANT.—The declaration set forth an indenture dated the 3rd of October 1846, whereby the defendant conveyed to the plaintiff No. 17, in the second concession of Sunnidale—

habendum in fee, free and clear, and freed and cleared, of and from all manner of incumbrances, under the reservations &c., in the original grant from the Crown; by which indenture the defendant covenanted that he was seised of the premises without any manner of condition, contingent proviso, power of revocation, or of limitation of new or other use or uses, or other restraint, or matter or thing whatsoever, to alter, charge, change, determine, defeat, or make void the same; that he had full right to convey; and for quiet enjoyment by the plaintiff, and that freely and clearly, and absolutely acquitted, exonerated and discharged, or otherwise well and sufficiently saved harmless and kept indemnified by defendant, against all former gifts, grants, bargains, sales, mortgages, jointures, dowers, uses, entails, acts, arrears of rent, statutes, recognizances, judgments, titles, charges, and incumbrances whatsoever, had, made, &c., by the defendant or any other person, or by or through his or their acts, means, procurement, consent, and privity; and for further assurance. A breach was then assigned, that the defendant had not good right to convey, negating the covenant in express words, but on the contrary thereof, long before and at the time of the executing the indenture, £10 was in arrear and unpaid for parliamentary taxes imposed on the said land, which sum was then a charge and incumbrance on the said land, and did not arise from any reservation, &c., in the original grant from the Crown; by reason of which taxes the land was afterwards lawfully sold to pay the said taxes.

Pleas—1. Denying that at the time of executing the indenture, any parliamentary taxes were due, as alleged in the declaration.

2. That the taxes mentioned in the declaration, or the sum due therefor at the time of executing the indenture, were not a charge or incumbrance on the premises.

3. That the land was not lawfully sold to pay the taxes, as in the declaration alleged. Issue was joined on these pleas.

At the trial at Niagara, before McLean, J., the plaintiff proved that a warrant dated the 20th of July, 1849, was issued by the clerk of the peace for the county of Simcoe, directed

to the sheriff of that county, commanding him, among other things, to sell this lot for £3 0s. 11d., eight years' arrears of taxes; that under this warrant the sheriff sold the land, and paid the taxes over to the treasurer of the county; that the sale was made on the 3rd of July, 1850, and a schedule filed in the registry office, and that, on the 7th of July, 1851, the sheriff made a conveyance to the purchaser. He also proved that the defendant stated he had offered £12 10s. to settle the matter; and gave evidence of the value of the lot.

The defendants counsel objected.—1st, That no covenant was shewn which operated as a warranty that the land was free from incumbrances; and that under the covenants set forth, the taxes were not an incumbrance on the land. 2ndly, That at the date of the indenture, there were no taxes in arrear for which the land could be sold. 3rdly, that there was not sufficient evidence that the land was legally sold. 4thly, That it did not appear that any patent was issued for the lot, or that it was liable to taxes, for which it could be sold.

The learned Judge reserved leave to the defendant to move on these objections; and told the jury that the defendant was not liable for anything which occurred subsequent to his alleged breach of covenant, but only for any incumbrance on the premises at the time of his executing the deed.

The jury gave a verdict for the plaintiff, and £50 damages.

Vankoughnet, Q. C., obtained a rule nisi for a new trial, the verdict being contrary to law and evidence, and for misdirection, and excessive damages.

Cameron, Q. C., shewed cause, and cited *McCollum v. Davis*, 8 U. C. R. 150.

DRAPER, J., delivered the judgment of the court.

It appears to us the taxes charged upon the land by virtue of the provincial statutes were an incumbrance for which in process of time the lands would be subject to be sold, in default of a sufficient distress being found on the premises, or the taxes being paid; and that, as the defendant executed a conveyance on the 3rd of October, 1846, some part of the £3 0s. 11d. directed to be levied for taxes by the warrant of

the 20th of July, 1849, must have been in arrear at the date of the conveyance, and so the defendant's covenant was broken. At the same time the damages appear to us to be excessive. The land was not sold until July, 1850, and the defendant had a year from that time within which he might have redeemed it. It must have been sold partly for taxes accruing after he became the owner; and the ultimate and entire loss of the land resulted from his taking no steps whatever to protect his interests. The language of the Chief Justice in *McCullum v. Davis* (8 U. C. R. 150), strongly applies:—"It would be too much to hold that it was the natural consequences of the defendant's leaving a small arrear of taxes due on the land—that the plaintiff should allow sixty acres to be sold to satisfy it, and should neglect to redeem it."

We think there should be a new trial on payment of costs, unless the plaintiff will reduce his verdict to the sum due for taxes at the date of the defendant's conveyance.

Rule accordingly.

TOMLINSON V. JARVIS.

8 Anne, ch. 14—*Action for sale of goods, not reserving rent—Liability of sheriff.*

The sheriff, having seised goods under a *fi. fa.*, received a written notice from the plaintiff that there was then due to him "one half year's rent" for the premises—not stating when the rent fell due, nor for what period it was claimed. The plaintiff afterwards went to the sheriff; and being asked when his rent fell due, said that he thought it would be *on the following Monday or Tuesday*. The sheriff thereupon ordered the goods to be removed and sold.

Held, that he was justified in so doing, as he was acting in reliance on the plaintiff's own declaration; and that he was not liable for any damages, although it appeared that the rent was in fact payable quarterly, and that one quarter was due at the time of seizure.

This was action on the statute against the sheriff for selling the goods of a debtor on an execution, and not leaving enough to pay a year's rent.

The declaration charged that on the 10th of February, 1852, and for half a year then last past, one Leavins held a certain tenement as a tenant to the plaintiff, at a certain rent therefor payable by Leavins; *and that on that day a large sum—viz., £20—for and on account of the rent so payable for one half year of the said tenancy, which ended at and upon that day*, became and was due and payable, and continually from thence hitherto hath been in arrear and unpaid; that

during the continuance of the second tenancy—viz., on the 12th of February, in the year aforesaid—the defendant, under pretence of a writ of *fi. fa.* against the said Leavins and his wife, issued from the Queen's Bench at the suit of one Break, took Leavins's goods then being in the said tenement demised, of a greater value than the amount of rent so due, viz., to the amount of £50; and that after such seizure, and during the tenancy, and before the removal of the goods, the plaintiff gave notice to the defendant *of the aforesaid rent so due and in arrear* to the plaintiff, and requested to be paid before their removal, but that the defendant nevertheless wrongfully carried away the goods without paying the plaintiff *the said arrears of the said rent* so due and in arrear to him, or any part thereof, contrary to the statute; and the plaintiff averred that he had not since been satisfied for any part of the said rent, laying his damage at £29.

The defendant pleaded—1st. Not guilty.

2nd. That Leavins did not hold the said premises as tenant to the plaintiff, in manner and form, &c.

3rdly. That at the said time when, &c., the said money in the declaration mentioned, or any part thereof, was not due by Leavins to the plaintiff, for and on account of the said rent, for the space of time in the said declaration mentioned.

4thly. Denying that the defendant did, *during the continuance of said tenancy*, take any of the goods of Leavins in manner and form, &c.

5thly. That the plaintiff did not, before the removal of the goods and chattels, give notice to the defendant *of the said rent* being due, or request the defendant to pay *the same*, before the removal of the goods, &c.

Issue was joined on all these pleas.

At the trial, at Toronto, before McLean, J., the evidence was such as to raise great doubt whether there was in truth any such relation as that of landlord and tenant between the plaintiff and Leavins, who was his son-in-law, in respect to the tannery in which the goods were seized, and in respect of which chiefly the rent was claimed. According to the plaintiff's account the demise was verbal, at £40 a year, and for no certain time, from the 10th of August, 1851; *the rent to be payable quarterly*.

The written notice given by the plaintiff to the sheriff was "that there is *now* due to me by H. Leavins *one half year's rent* for the premises upon which you have entered and levied," &c.; not stating when the rent fell due, nor for what period it was claimed.

The plaintiff's evidence was that the tannery, saw-mill, and dwelling-house, were let verbally to Leavins on the 10th of August, 1852, at £40 a year, to be paid *quarterly*.

The defendant's evidence proved that the *fi. fa.* was received by the sheriff on the 12th of February, 1852, and that the goods were seised immediately after; that on the 17th of February, the plaintiff came in consequence to the sheriff, and spoke of rent being due to him.

He was asked when it fell due; to which he replied that he did not know when it would be due, but he thought it would be on the following Monday or Tuesday. This was after the written notice had been served. The sheriff, being told by the plaintiff that the rent which he claimed was not yet due, directed the goods to be removed and sold.

The jury gave their verdict for £10, as being a quarter's rent, which must have been the first quarter from the 10th of August, 1851, and all the rent that they found to be then due.

Vankoughnet, Q. C., obtained a rule for a new trial on the law and evidence, and for misdirection. *Bell* shewed cause.

In addition to the cases noticed in the judgment, *Risley v. Ryle*, 11 M. & W. 16, was cited in support of the rule.

ROBINSON, C. J., delivered the judgment of the court.

Nothing is clearer than that, upon the words of the statute 8 Anne, ch. 14, the sheriff can only detain from the landlord such rent as is due at the *time of taking the goods*; and the case cited by Mr. Vankoughnet, of *Hoskins v. Knight* (1 M. & S. 245), is express upon that point, and also *Gwilliam v. Barker*, (1 Price, 274).

Nothing was decided in the case cited of *Harrison v. Barry* (7 Price, 690), that bears upon the question raised in this case. This, however, only shews that for the second quarter the claim was rightly disallowed. But it is contended further, that upon the evidence given, the sheriff cannot be held

to have been a wrong-doer in not paying over any rent to the landlord, for that the landlord is bound by his own declarations, and that he stated to the sheriff some days after the seizure that the rent was not yet due, but would fall due in a few days.

If he had corrected that statement, supposing it to be untrue (and there is great reason to doubt whether truly and *bonâ fide* there was any rent in the case), and had told the sheriff that—instead of half a year's rent being due when he gave his written notice, as that notice imported, or instead of the period being yet to come when any rent would be due to him, as his verbal notice imported—the fact was (which must have been known to himself, and could not be known to the sheriff) that the rent was payable quarterly and not half-yearly, and that one quarter was clearly and long ago due, and no more; and if this information had been given before the sheriff had paid over the money on the execution, then the plaintiff would have had a clear right of action. But the plaintiff, in our opinion, cannot recover against the sheriff as a wrong-doer because he believed the plaintiff's own account of the transaction, and acted accordingly. Taking the facts to be as the plaintiff stated, then, if the sheriff had paid over the half-year's rent to the landlord, he would have incurred a liability to the execution creditor. He was called upon to act according to what the plaintiff told him, and could not tell by anticipation that the plaintiff would set up afterward a holding of a different kind from that of which the written or verbal notice gave intimation.

We think there should be a new trial without costs.

Rule absolute.

PATERSON V. COLLINS.

Libel—Inn-keeper—Words not actionable.

The declaration charged as a libel the following words: "You have stolen goods in your house, and you know it;" and imputed as the meaning that he, the defendant, knew the goods were in his house, and were stolen. *Held*, not actionable, though spoken of and to an inn-keeper.

CASE.—The first count of the declaration stated that the plaintiff, before and at the time, &c., was an inn-keeper, and

person of good name, credit, &c.; yet that the defendant, well knowing the premises, but contriving, and wickedly and maliciously intending, to injure the plaintiff in his trade and business of an inn-keeper, and to bring him into public scandal and disgrace, heretofore, to wit, on, &c., "Spoke and published of and concerning the plaintiff, and of and concerning him in his said trade or business of an inn-keeper, the false, scandalous, malicious, and defamatory words following, that is to say, 'you (meaning the plaintiff) have stolen goods in your house, and you know it,' meaning thereby, that the plaintiff had stolen goods in the said inn of the plaintiff, and that he, the plaintiff, knew the said goods were in his said house, and that the same were stolen." By means of the committing of which said grievances by the defendant, the plaintiff hath been and is greatly injured in his said good name, trade, and business as an inn-keeper, credit and reputation, and brought into public scandal and disgrace, and hath been and is shunned and avoided by divers persons, and otherwise injured.

Demurrer—Because, although the defamatory words are alleged to have been spoken of the plaintiff in his trade and business as an inn-keeper, yet it is not shewn that the plaintiff suffered any special damage by reason thereof; also, that the said words are not in themselves actionable.

Eccles for the demurrer.

Cameron, Q. C., contra, cited *Hoare v. Silverlock*, 12 Q. B. 624; 3 Salk, 326; *Whittington v. Gladwin*, 5 B. & C. 180.

ROBINSON, C. J., delivered the judgment of the court.

We do not think the words charged in the first count are actionable, though spoken to and of an inn-keeper, as alleged. They have no particular reference to the business of an inn-keeper. It is not more discreditable to an inn-keeper than it is to any other individual to have stolen goods in his house, and to know that they were stolen, unless there has been something legally or morally wrong in the manner of their coming into his possession, or in the purpose for which he retained them. Goods that have been stolen are not to be destroyed, or thrown into the street. They are to be, and must be kept somewhere, till an owner comes to claim

them, or till they can be properly reserved, or till the ends of justice have been satisfied.

The words, "and you know it," are significant, and seem to intimate clearly that the plaintiff knew there was something wrong in the matter; but what the imputation was which those words, added to the others, intended to convey, ought to have been stated in the declaration, and the meaning imputed to the words should have been such as to be evidently prejudicial to the character of an inn-keeper. Here the plaintiff has told us in the declaration what the defendant did mean by the words, namely, that the plaintiff had in his house stolen goods, *and that he knew the said goods were in his house, and that the same were stolen.* This of itself is not injurious to the character of any man, unless when he received the goods into his house he knew them to be stolen; or unless, after he became aware of the fact, he either concealed the goods, or knowingly harboured them to serve some corrupt purpose of himself or others.

Judgment for defendant on demurrer.

O'DOUGHERTY V. FRETWELL.

Arbitration—Appointment of umpire—Surrender of term.

The plaintiff held from the defendant a lease of a farm, for a term of years unexpired. The plaintiff and defendant, with D. and M. entered into a bond by which the four became bound to each other in £200, with a condition reciting that "the parties to these presents have mutually agreed to separate from each other, and cancel all arrangements heretofore made, and leave all matters and controversies existing between them, either at law or in equity, to the arbitration and decision of Thomas Duncan and Patrick Durning, indifferently chosen; and should they not agree, to choose an umpire, whose decision shall be final." The four parties named signed the bond, but only two seals were affixed, and it seemed that all four touched the seals. The two arbitrators not agreeing, appointed an umpire, who awarded that the defendant "shall release and give up to O'Dougherty" (the plaintiff) "the term of years, as agreed to in the submission, and also deliver up the stock of farming utensils in proper order, and without further delay; and that the lease then held by both parties of the said farm be immediately cancelled."

Held, that the submission bond was not to be considered as in itself a surrender of the term, but imported only that the parties had submitted it to the arbitrators to put an end to the lease upon such terms as they should think right; that even if the intention of the parties were otherwise, the term would not be surrendered, for the bond could not be held to be such a deed as is required by 14 & 15 Vic. ch. 7, sec 4; that the award would not amount to a deed of surrender by the defendant, as required by the statute—and therefore that the plaintiff could not eject the defendant.

Held, also, that by the terms of the award the umpire should have been appointed by the parties, not by the arbitrators.

EJECTMENT for lot 28, 4th concession of Gloucester. The defendant limited his defence to part of the lot.

At the trial at Bytown, before Macaulay, C. J., in October, 1852, the plaintiff proved an indenture of lease, dated 16th of January, 1849, made between himself and the defendant, whereby the plaintiff demised to the defendant the premises in question, *habendum* for seven years from the 1st of April, 1850; this lease contained a multiplicity of covenants to be performed on both sides; the rent was payable by a share of the produce raised. Next, a bond, dated 12th of May, 1852, purporting to be made by Thomas Fretwell and George Fretwell, and John O'Dougherty and John W. Laughlar, by which they became bound to each other in the penal sum of £200; with a condition, reciting that Thomas Fretwell had a farm on shares from John O'Dougherty, for a term of years not yet expired, and that "the parties to these presents have mutually agreed to separate from each other, and cancel all arrangements heretofore made, and leave all matters and controversies existing between them, either at law or in equity, to the arbitration and decision of Thomas Duncan and Patrick Durning, indifferently chosen; and should they not agree, to choose an umpire, whose decisions shall be final." This bond was subscribed by the four parties named, with two seals only affixed. From the evidence of the subscribing witness it seemed the bond was at first prepared to be executed by the plaintiff and defendant; then it was agreed to have two sure and the other two names were inserted. All four signed, and the two seals were added: the witness thought all four touched the seals, but he was not sure; he thought they were put there to bind the sureties.

The two arbitrators entered at once into the investigation, and, not agreeing, they appointed an umpire, John Cunningham. He first of all signed a paper as an award, or memorandum for an award, and afterwards signed and sealed an award, dated the 19th of May, 1852, in which the submission was recited, and that Duncan and Durning could not agree, and therefore appointed him umpire; and he directed that the defendant should give up to the plaintiff the term of years unexpired of the lease, and should

deliver up the stock of farming utensils, &c., received by him from the plaintiff, without delay, and that the lease should be immediately cancelled; and that the plaintiff should pay to the defendant £1 1s. 7d. Durning was a subscribing witness to the award, and stated his concurrence in it.

For the defence it was objected that the lease was neither surrendered nor cancelled, and that it therefore barred the plaintiff's right to recover; that the submission did not authorize the arbitrators to cancel the lease; that the submission was not sealed by the plaintiff or defendant; that the power to appoint the umpire was not conferred on the arbitrators; that the award did not cancel the lease—it only directed it to be cancelled; that the first paper signed by Cunningham was the true award, and he could not afterwards execute a second under his hand and seal, and that the latter was inadmissible; that the arbitrators were not proved to have appointed the umpire, unless a verbal appointment be sufficient.

For the plaintiff it was contended that the submission bond was a sufficient surrender, for that the recital of an agreement to cancel had the effect of a surrender.

The defendant went into evidence to impeach the award, by shewing that the umpire refused to hear witnesses; after which the Chief Justice left it to the jury to determine whether the bond was the deed of the plaintiff and defendant, and whether the umpire made the award, not acting, as suggested in the defence, so as to invalidate it. They found for the plaintiff on the bond and the award—damages 20s.; leave being reserved to the defendant to move for a non-suit on the objections raised.

Hagarty, Q. C., moved to enter a non-suit on the leave reserved, or for a new trial on the law and evidence. He cited *Doe dem. Morris v. Rosser*, 3 East 15; *Russell on Arbitration*, 460, 478, 479; *Thorpe v. Eyre*, 1 A. & E. 926; *Hunter v. Rice*, 15 East 100; *Doe dem. Clarke v. Stillwell*, 8 A. & E. 646; *Still v. Halford*, 4 Camp. 17; *Davis v. Vass*, 15 East 97; *Com. Dig. "Arbitrament" D. 3.*

Draper shewed cause, and cited *Everard v. Paterson*, 6 Taunt. 625; *Price v. Jones*, 2 Y. & J. 114; *Thomas v. Cook*, 2 B. & Al. 119.

ROBINSON, C.⁶J., delivered the judgment of the court.

The questions to be considered in this case are:

1. Was the submission bond proved to have been duly executed; that is, signed and sealed by the defendant Fretwell?

2. If so, was such bond, by reason of the recital contained in it, of itself a surrender of the term?

3. If not in itself a surrender, then has the award the effect of working a surrender?

And in regard to the award there are these questions:

1. Was it legally made by Cunningham, he not being appointed umpire by the parties referring, but by the arbitrators?

2. If the arbitrators, by the terms of the bond had power to appoint him in case of their disagreeing, did they disagree, and was he so appointed?

3. Was his award valid under the facts proved—that all testimony was excluded, though evidence was required to be taken?

4. If the award made by Cunningham be valid, then did it put an end to the term?

The jury seem to have inclined strongly in favour of the plaintiff, (and probably they had reason to believe that the justice of the case is with him), for after hearing the direction of the learned judge, they found for the plaintiff *on the bond and on the award*, by which we can only suppose them to have meant, that so far as any facts were left to them to find, in order to support the due execution of the bond and the validity of the award, they upheld both. Still the legal effect of what is contained in either instrument is of course purely a question of law, which we are bound to determine.

We must now, we think, after the finding of the jury, assume that the bond was signed and sealed by the parties, as well as by the sureties; and indeed the instrument has the appearance of being executed at the same time by all, and therefore we may well believe that it was sealed by the four, though but two seals are affixed, which might well be, as several may seal with one seal.

Then as to the effect of the bond upon the existing lease,

did it operate of itself as a surrender ? It was executed on the 12th of May, 1852. The term was for seven years from the 1st of April, 1849, and the condition of the bond runs thus : " The condition of this obligation is such, that whereas the said Thomas Fretwell has a farm on shares from the above-named John O'Dougherty, for a term of years not yet expired, and whereas the parties to these presents have mutually agreed *to separate from each other, and cancel all arrangements heretofore made*, and to leave all matters and controversies existing between them, either at law or in equity, to the arbitration and decisions of Thomas Duncan and Patrick Durnan, indifferently chosen, *and should they not agree, to choose an umpire*, whose decision shall be final : on strictly conforming with the above conditions this is to be null and void, or otherwise to remain in full force and virtue."

Duncan was the arbitrator chosen on the defendant's part. He wanted evidence to be called on certain points. The plaintiff and the other arbitrator objected, insisting that the understanding was, that there should be no witnesses examined ; and Duncan swore on the trial of the case that it was for that reason that he refused to go on with the arbitration, and not because he and the other arbitrators differed in regard to the merits of any matter in dispute. Cunningham being asked to act did so, but he received no evidence. On the 19th of May, 1852, Cunningham made an award under seal, which Durnan also signed, but seems not to have sealed, in which the submission bond is recited ; and it is further recited that Durning and Duncan, not being able to agree upon a settlement of the matters submitted, had, " pursuant to the submission bond, chosen him, Cunningham, as an umpire ;" and having, as he says, duly considered the matters referred to him, he awards that Fretwell "*shall release and give up to O'Dougherty the the term of years, as agreed to in the submission*, and also deliver up the stock and farming utensils, in proper order, and without further delay ; and *that the lease then held by both parties of the said farm be immediately cancelled* ; and that Fretwell shall pay forthwith to O'Dougherty £1 1s. 7d."

Now, upon the first question—whether the submission bond

was in itself a surrender by Fretwell of the term : Is it the reasonable construction of the instrument, that the parties, or at least the lessee, had, by some deed executed for that purpose, surrendered the term before they entered into this reference ?—or that by that bond they intended to surrender it ?—or is it the more reasonable and proper construction that the whole was to be indivisible and go together to the arbitrators to be awarded upon, but that no part should be taken to be conclusively done before the final settlement which the arbitrators were to make ; in other words, that they were willing to have the lease put an end to upon such terms as the arbitrators might determine, placing the whole at their disposal ; not that the lease should be cancelled, and the term at an end, whether the arbitrators should ever make an award or not. The arbitrators seem from the award to have considered that the intention was such as I have last stated, for they award that “*the term of years shall be given up, as agreed to in the submission, and that the lease shall be immediately cancelled,*”—that is, they direct it to be done. We think nothing more was meant than that the parties had submitted themselves to the arbitrators to the full extent of putting an end to the term, and upon such terms as they should think just, and that the recital in the bond neither imported that there had been already a legal surrender made, nor that the parties were by the recital itself surrendering the term.

If, however, we could say that upon the face of the submission bond the intention of the parties was otherwise, then we have to consider the effect of our statute 14 and 15 Vic., ch. 7, sec. 4, which enacts that a surrender of any term which could only have been created by writing shall be void unless *made by deed*. Can we say that this bond amounts to a deed of Fretwell surrendering the term ? We are of opinion that Fretwell's recital under his seal that he *had agreed* with O'Dougherty to separate from him, *and to cancel all arrangements* heretofore made, does not amount in itself to a deed of surrender.

Then, if not, does the award amount to what the statute just referred to requires ? We think clearly not ; for if we

could treat the award as the deed of the parties, or equivalent to it, which we do not consider it to be, there is this defect, that the submission, in our opinion, though it is somewhat obscure in that respect, reserves the appointment of an umpire to the parties themselves, and does not vest the power in the arbitrators to appoint him. That, at least, is the grammatical construction of the language used.

We think that nothing was shewn which we can hold to be an actual surrender of the term, either by deed or in law; and that, the term being yet unexpired, the plaintiff cannot insist upon regaining the possession. The rule must therefore be made absolute for nonsuit.

Rule absolute.

HAWKSHAW V. HODGINS.

Dower.

Action for dower in lands of demandant's late husband—no suggestion on the record that the husband died seised.

Pleas—1. That tenant is and always has been ready to render dower. 2.

Tout temps prist, and a tender of dower and refusal, before action brought.

Replication,—to first plea, praying judgment of demandant's dower to be assigned to her: to second plea, a demand and refusal by tenant—the rejoinder to which was demurred to.

Held, That upon this record there could be no assessment of damages.

DOWER.—Count upon the seisin of demandant's late husband, Oliver Hawkshaw, of and in the east half of No. 17, in the 2nd concession of the township of Russell.

Pleas—1. That the tenant is and hath always been ready to render to demandant her dower.

2. *Tout temps prist*, and a tender of dower and refusal thereof, before action brought.

Replication—to the first plea, prayed judgment to recover seisin of her dower, to be held in severalty by metes and bounds. To second plea, a demand and refusal by the tenant,—the rejoinder to which was in substance a repetition of the plea, and was demurred to.

The case came on for trial at L'Original, in May last, before Robinson, C. J. The demandant proved that on the 19th of June, 1852, there was served on the defendant a writing, whereby she demanded the dower to which she was

entitled in the east half of lot seventeen in the second concession of Russell, as widow of Oliver Hawkshaw deceased, from the defendant. The count was filed on the 3rd of September, 1852.

The defendant's counsel objected that there was no issue to try, and no suggestion on the record of the husband's dying seised, and of demand and refusal. The learned Chief Justice allowed the plaintiff to take a verdict for 1s., subject to the objection.

Richards moved to set aside the assessment as irregular, with costs; objecting that there was no issue in fact to be tried, and no suggestion or statement on the record that the demandant's husband died seised of the lands in which dower is claimed; that contingent damages could not be assessed in the present state of the record; that no such damages could be assessed after the demandant had confessed the truth of the first plea, by her prayer of judgment, and that without an allegation on the record that a demand in writing had been made before the action was brought, no damages were recoverable—he cited *Park on Dower*, 301, 303; *Co. Lit.* 32*b*; *Jones v. Jones*, 2 Cr. & J. 601; *Empey v. Loucks*, 8 U. C. R. 374.

No one appeared to shew cause.

ROBINSON, C. J., delivered the judgment of the court.

It is very plain, as I thought at the trial, that there was no pretence for going to a jury upon the record as it stood, for the demandant had taken judgment, as she was entitled to do, upon the plea of *tout temps prist*, and the only other question was involved in a demurrer put in to the rejoinder to the plaintiff's replication, so there was no issue in fact, and could therefore be no assessment of contingent damages on the demurrer; and this is independent of the other objection, that without an allegation of the husband dying seised, there could at any rate have been no recovery of damages, even when there had been a demand—for which the case cited, of *Jones v. Jones*, is a very clear authority.

Rule absolute.

SHAW V. ST. LAWRENCE COUNTY MUTUAL INSURANCE COMPANY.

Insurance—Statement of title—Affidavit of loss.

The plaintiff applied for an insurance with the defendants as if the property were his own, stating that it was occupied by himself, and unencumbered; and he obtained a policy for two-thirds of the actual value. It appeared that he was only a lessee for years of the land on which the buildings were erected.

Held—That he had so misrepresented his interest in the property as to avoid the policy.

The affidavit of loss sent in after the fire had no jurat, and was not in the form of an affidavit, and on that ground also the plaintiff was precluded from recovering.

This was an action on a policy of insurance, dated 2nd of July, 1849, whereby the plaintiff became a member of the company, and they, on receipt of a premium of £9, insured to the amount of £300, on a grist-mill, a water-wheel, one run of stones, and certain bolts and elevators, for five years, commencing at twelve o'clock meridian on the 2nd of July, 1849.

The defendants pleaded—1. *Non assumpserunt*. 2. That the property was not destroyed by fire *modo et forma*. 3. That the plaintiff did not forthwith give notice of the loss to defendants. 4. That the plaintiff did not within thirty days after the loss deliver to the defendants a particular account of the loss, signed by him, and verified by his affidavit. 5. That at the time of making the insurance the plaintiff wrongfully concealed from defendants certain facts which the plaintiff knew, and made misrepresentations thereof to the defendants; namely, that the plaintiff held the premises on which the mill was erected under a lease not then expired, and falsely represented to defendants that the grist-mill belonged to the plaintiff, and was free from incumbrances, which were matters material, &c.: verification. 6. That after the fire the plaintiff was guilty of fraud, in this, that he delivered to the defendants a false and fraudulent account of the loss and damage, as and for the account mentioned in the policy, representing his loss to be £300, whereas it was only £100, as the plaintiff well knew. 7. That the plaintiff went before J. B., a justice of the peace, and made affidavit in support of his claim, in which affidavit there was false swearing within the true meaning of the policy; in this, that the plaintiff swore

that he was then the *bonâ fide* owner of the property mentioned in the said policy, and that there was then no incumbrance on it; whereas the plaintiff was not *bonâ fide* owner, and there was incumbrance, to wit, a lease from one Hoshel to the plaintiff, under which the plaintiff held the same: verification. 8. That one condition of the policy was, that not more than two-thirds of the cash value of the property was to be insured, and that at the time of making the policy the plaintiff falsely represented to the defendants that such two-thirds was equal to £300, whereas it was only equal to £100, as the plaintiff well knew: verification.

The replication joined issue on the 1st, 2nd, 3rd, and 4th pleas, and replied *de injuriâ* to the 5th, 6th, 7th, and 8th.

At the trial at Toronto, before Macaulay, C. J., it appeared that the plaintiff applied to the defendants to insure his grist-mill, water-wheel, one run of stones, and bolts and elevators, situate in the township of Markham, on the 2nd of July, 1849, for £300, which he represented to be two-thirds of the value. He described the property as occupied by himself and as unencumbered; and he received in return a policy of insurance, as set forth in the declaration, for five years. The property was destroyed by fire on the 8th of April, 1851, at about ten o'clock in the forenoon. The plaintiff, after the fire, transmitted a paper, somewhat irregularly drawn, to the defendants, not purporting on the face of it to be an affidavit, setting forth, among other things, that he was *bona fide* owner of the grist-mill and machinery therein, and that he had not any incumbrance on the said property. But it also appeared that by an indenture dated the 7th of August, 1848, one George Hoshel leased to the plaintiff a parcel of land in Markham, being the south part of the west half of lot No. 11, in the 2nd concession of Markham, *habendum* for ten years, from the 30th of June, 1848, at the rent of one barley-corn; and the plaintiff covenanted therein that by the first of December then next he would at his own costs erect and finish a substantial wooden building 36 × 26 and 21 feet posts, and keep the race on the premises with a substantial covering; and construct, &c., a water-wheel as large as the fall of water on the premises would permit; and would insure

the premises in a responsible company, and assign the policy to the lessor, and keep the building and premises in repair. After the fire, the defendants' secretary saw the plaintiff, and asked him what he considered the value of his property the day before the mill was burnt; the plaintiff replied he would have taken £150 in cash. The plaintiff was then asked if he considered that the value of his interest, and he said yes; and he was asked if he would accept two-thirds of that sum, but he declined, claiming £300. The defendants' secretary swore that had the defendants been informed that the plaintiff had only a lease, the insurance would have been different, as they would only have insured two-thirds of the value of the plaintiff's interest as a tenant, and not two-thirds of the actual value of the property. The plaintiff called witnesses, being himself also examined to support his own case, to prove that the property was worth £450. They did not, however, quite come up to that, as of their own knowledge or estimate, apart from the plaintiff's own testimony; the mill itself, without the machinery, was only valued at £100.

It was objected that the notice and affidavit of loss were insufficient according to the terms of the policy. Leave was reserved to the defendants to move to enter a verdict for them on that issue. And, secondly, that the plaintiff was not owner as the application imported; that this misrepresentation made the policy void, or that the qualified nature of his interest was equivalent to an incumbrance, and therefore should have been stated.

The learned Chief Justice held, after perusing the lease to the plaintiff, that the case resolved itself into one of legal fraud, and reserved leave to the defendants' counsel to move to enter a verdict for defendants on this ground also.

The jury gave the plaintiff a verdict and £336 damages.

M. Vankoughnet obtained a rule calling on the plaintiff to shew cause why the verdict should not be entered for defendants on the leave reserved, or why a new trial should not be had, the verdict being contrary to law and evidence, and against the weight of evidence.

Eccles shewed cause.

Vankoughnet, Q. C., supported the rule—citing *Walroth*

v. St. Lawrence County Mutual Ins. Co. 10 U. C. R., 525—
Wood v. Stephens, 3 Moore 326.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the rule for entering a verdict for the defendants must be made absolute, for there really cannot be said to have been any such affidavit furnished of the loss as the policy requires. It does not purport on the face of it to have been a statement made on oath; there is no *jurat* subscribed to it; and the only ground for imagining it to be an affidavit is, that in the same paper there is a short notice to the defendants of the loss, in which the paper I have just spoken of is called an affidavit,—but that alone could not make it an affidavit, unless there was something in the form of the paper itself to denote that it was so. The defendants were entitled to resist payment of the loss till an affidavit such as the policy requires had been sent to them, and they certainly could not be called upon to recognize this writing as an affidavit.

They would, therefore, have been justified in refusing on that ground alone to pay, until such an affidavit should be sent. This being so, they are not yet in default, for they could never be made guilty of a breach, upon proof being given *viva voce* at the trial, that in fact the plaintiff did take his oath before a magistrate of the truth of that statement. If that would make it an affidavit, the defendants should have been apprised of that fact which it was not shewn they were, and we think they could not be bound to give credit to it till they saw the usual certificate of the due taking of the oath subscribed to the affidavit.

But the evidence shewed the policy void on the grounds taken. The property was untruly described as being the property of the insurer, when he had only an interest in it as lessee for a short period. Whether he could under such circumstances have insured the mill for its full value or not, he was bound to state the facts truly as they were; but the statements in his application on which he obtained his insurance were untrue in two most important particulars,—the mill was not his,, as he stated, but he was in possession only

for a time, as tenant ; and he grossly over-stated the value of the mill, and especially of his interest in it. We think that the plaintiff should retain his verdict on the first, second, and third issues, but that on the others the verdict should be entered for the defendants.

Rule accordingly.

SMITH V. CARDER.

Causes of action improperly joined—Arrest of judgment, or venire de novo.

CASE, by the husband alone, for negligent and unskilful treatment of his wife in childbirth.—The first count was bad for merely stating negligence without averring any damage accruing therefrom. The second count alleged that by reason of the defendant's improper treatment of the plaintiff's wife her life was endangered and she was much injured,—being a ground of action for which the husband could not sue alone. The third count combined different causes of action, some for which the husband should sue alone, and others for which the wife should be joined.

Held, that the proper course was to arrest the judgment, not to award a *venire de novo*.

The plaintiff, Clarendon Smith, sued the defendant in an action on the case, for unskilfully and negligently treating his wife, Margaret Smith, in childbirth. The first count merely charged that the defendant conducted himself in an ignorant, unskilful, negligent, and improper manner, in the delivery of the plaintiff's wife ; not alleging any injury in particular.

In the second count the plaintiff alleged that by reason of the unskilful and improper treatment of the case the plaintiff's wife was greatly injured in her body, setting out in what respect, and stating that thereby "the life of his wife became endangered, and she became and was much injured."

In the third count it was charged that the defendant was not duly authorized to practice, but held himself out as a person qualified, and that the plaintiff, believing that he was so qualified, employed him to attend his wife during her confinement ;—that he treated her ignorantly and unskilfully, by reason whereof the plaintiff's wife was and is greatly injured in her health and constitution, and suffered great pain, and that her recovery was greatly delayed ;—that plaintiff had been put to great expense, namely £100, in curing his wife of the illness occasioned by the defendant's maltreatment of her case, and was deprived for a long time of the services and society of his wife, and his wife was and

is greatly injured in her health, and *lamed*; to the plaintiff's damage of £1000.

The defendant pleaded—1st. Not guilty. 2nd, to first and second counts, traversing the retainer of the defendant.

The cause was tried at Woodstock before *Burns, J.*, and a verdict rendered for the plaintiff of £25.

J. Duggan obtained a rule *nisi* for new trial on the law and evidence; or that judgment should be arrested, or *venire de novo* awarded for nonjoinder of the wife, as to all or several of the counts, and because the third count shewed no cause of action. He cited *Chy. on Plg. I. 83, 85; II. 488; Pippin v. Sheppard, 11 Price 400. Eccles* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

It is quite clear, we think, that the first count of this declaration lays no good cause of action, for it merely states negligence, without averring that any injury or damage accrued to any one from that negligence. An action might as well be brought against the driver of a stage coach for negligence in letting the reins drop from his hand, or in not having his wheels well secured, when the carriage nevertheless went safely to the journey's end, and no injury was suffered by any one.

The second count alleges, as a consequence of the defendant's unskilful and negligent treatment of the plaintiff's wife, that her life was endangered and she was much injured. If this be a sufficient ground of action, it is ground for an action in which it is indispensable that the wife should join in suing, and for which the husband cannot maintain an action alone.

The third count combines causes of action of different descriptions;—some for which damages cannot be sued for by the husband without the wife, because the injury and loss alleged pertain exclusively or chiefly to her; and others for which it is right that the husband should sue alone, being for alleged pecuniary damages to which he was subjected in consequence of the defendant's improper treatment of his wife's illness.

Upon a declaration so framed the plaintiff has recovered a general verdict for £25 damages, which certainly cannot be

sustained. The question is, what is the proper course to be taken upon the application which has been made against it. We think we should make absolute the rule for arresting the judgment; for it has been decided that *venire de novo* is not the proper remedy where general damages are assessed upon a declaration containing a misjoinder of counts—though where the defect is, that general damages have been assessed where one of the counts or breaches in the declaration is *bad*, a *venire de novo* is the proper remedy.

This case happens to combine both objections; for the first count states no sufficient cause of action, in favor of any one; but as different causes of action are joined in the action, for some of which the husband and wife should sue, and for others the husband alone, we take the proper course to be to arrest the judgment, for this is certainly not a record to take a second time to trial, the objections not being such as could be cured by any form of taking the verdict.

Judgment arrested.

DIXON ET AL. V. DALBY.

Trover—Lien.

The plaintiffs owning a line of stages, entered into a special agreement with the defendant, an inn-keeper, for the stabling and feed of their horses. Some dispute arose as to the defendant's charges, and ascertaining that the plaintiffs intended to remove their horses to another inn, he refused to let them go. The plaintiffs then brought trover

Held, that the defendant had no right of lien, as the plaintiffs were not guests, but employed the defendant in the character of a livery stable keeper, and under a special agreement which gave him no continuing right of possession.

Held, also, that a conversion was sufficiently proved.

TROVER for horses and harness.

Pleas—1. Not Guilty. 2.—Plaintiffs not possessed, &c., as of their own property.

The case was tried at the Toronto assizes, in May last, before the Chief Justice of the Common Pleas. It appeared in evidence that the plaintiffs were owners of a stage line from Toronto to Bradford, and that the defendant kept an inn at Richmond Hill. The agreement had been made to pay him £2 per month, for each team of four horses stabled at his inn; the plaintiffs to pay the cost price of oats, in

addition which it seemed were purchased by themselves or defendant,—but if by him, then charged in his account at cost price, as purchased for the plaintiffs. The drivers were to be boarded at 7s. 6d. per week. The defendant's bills were settled monthly, and his account for November, 1852, was settled, after some delay, on the 30th of December, 1852, in full; but that for December was disputed. During December the plaintiffs resolved to discontinue the arrangement, and to put up their horses at another inn. The defendant seemed to have become aware of this, though in what manner was not shewn. On the 25th of December, 1852, four horses of the plaintiffs' were driven to the defendant's inn, and put into the stable, and he refused to let them be taken away: but on the Monday, at the request of the driver, he allowed another team of four horses to be put into his stable, and that brought on the 25th to be removed, and he detained this team until the Saturday following:—for this detention the action was brought.

The case was submitted to the jury on two points,—conversion and lien; the learned Chief Justice expressing doubt if there had been a conversion, even though the defendant had no right of lien, which he inclined to hold; and he told the jury that if there was a special agreement existing, the defendant had no lien; but if no special agreement there was one, and that if there was no lien there was evidence of a conversion. The jury found for the plaintiff, and £10 damages.

Boyd, moved to enter a nonsuit on the leave reserved, or for a new trial on the law and evidence, or for misdirection. He cited *York v. Grindstone*, 1 Salk. 388.

Eccles shewed cause, and cited *Binns v. Pigot*, 9 C. & P. 208; *Crawshay v. Homfray*, 4 B. & Al. 50 *Jackson v. Cummins*, 5 M. & W. 342; *Jones v. Tarleton*, 9 M. & W. 675; *Chase v. Westmore*, 5 M. & S. 180.

DRAPER, J., delivered the judgment of the court.

There was certainly no lien in this case. The plaintiffs, who owned the horses, did not as guests bring them to the defendant's inn, but under a special agreement. At common law a livery stable keeper has no right of lien; and according

to the special agreement this is the character in which the defendant had the horses in his stable. And it is clear that, according to the agreement, he had no continuing right of possession; for the plaintiffs had the right of using the horses daily to draw their stage coaches to and fro. This is the principle on which *Forth v. Simpson* (13 Q. B. 680) was decided—in which case all the leading cases are cited and reviewed.

As to the conversion, it seems to us there was abundant evidence to go to the jury. We are of opinion the rule should be discharged.

Rule discharged.

MAULSON V. ARROL ET AL.

Promissory note—New trial—Facts admitted by pleadings.

In an action against the makers and indorsers of a promissory note, it is not necessary that all the defendants should concur in an application for a new trial.

Assumpsit by the indorsee against the maker and first and third indorsers of a promissory note. The third indorser let judgment go by default.

5th plea—By the maker and first indorser—That the note was made and indorsed by defendants,—setting out circumstances, owing to which, before the note was indorsed to the plaintiff, and before the commencement of this suit, the defendant by agreement with R. G. and O. G., (the second and third indorsers,) made and indorsed, and delivered to them another note, which was accepted in full satisfaction and discharge of the note sued upon, but which note remained in the hands of the said R. G. and O. G. without the fault of the defendants,—with an averment that there never was any value or consideration for the endorsement by the said R. G. and O. G. to the plaintiff. *Replication*—That the plaintiff took the note for a good and valid consideration, and became and is the holder thereof in good faith.

Held, that on this issue the introductory facts were admitted; and the proof of consideration lay on the plaintiff.

ASSUMPSIT brought by the plaintiff as indorsee against Arrol as maker, Fraser as first indorser, and Orin Gee as third indorser, of a promissory note, dated 10th of February, 1852, payable nine months after date to Fraser or order, for £250.

The note was indorsed by one Rodman S. Gee, as the second endorser, but he was not sued.

The defendant Gee let judgment go by default; the other defendants pleaded—1st. Non assumpsit. 2nd. Denial of their respective making and indorsing. 3rd. That the note was made and indorsed by them to Rodman S. Gee and Orrin Gee, upon the purchase and sale to defendants by the said R. S. Gee and O. Gee, of goods; setting out cir-

cumstances, owing to which,—before the note was indorsed to the plaintiff, and before the commencement of the suit—the defendant by agreement with R. S. and O. Gee, made and indorsed and delivered to them another note, which R. S. Gee and O. Gee accepted in full satisfaction of the note sued upon; but which note remained in the hands of R. S. Gee and O. Gee without the fault of the defendants; and that R. S. Gee and O. Gee indorsed and delivered the note sued on to the plaintiff after it became due.

The fourth plea set out the same introductory facts; but averred the indorsement to the plaintiff to have been made with full notice to him of the premises (not saying after it became due.)

The 5th plea set out the same introductory facts; and averred that there never was any value or consideration for this indorsement by R. S. Gee and O. Gee to the plaintiff

Replication, joined issue on the first and second pleas. To the third, answered that the plaintiff received the note before it became due—with a special traverse of receiving it after it was due. To the fourth, traversed the notice alleged, and averred that he took the note for a good and sufficient consideration—to wit, the amount of the note. To the fifth, that he took the note for a good and valid consideration, and became and is the holder thereof in good faith.

The cause was tried in April last, at Chatham, before *McLean, J.* The making and indorsing by Arrol and Fraser were admitted; and evidence was given that the plaintiff held the note before it fell due, and procured it to be presented for payment, and the endorsers to be notified. This was the plaintiff's case. The defendants' counsel then proposed to call the plaintiff himself, having, as was admitted, given proper notice for the purpose. The plaintiff was not present, and thereupon the defendants' counsel claimed that the issues on the third, fourth, and fifth pleas, should be taken *pro confesso* against the plaintiff.

The learned Judge held that the evidence that the plaintiff was the holder before the note became due was conclusive as to the third issue; that on the fourth plea the plaintiff was entitled to succeed; and that the fifth plea was, that there

never was any value for the endorsement by R. S. Gee and O. Gee to the plaintiff, but does not allege that when the action was brought the plaintiff held the same without value; that the plaintiff claimed under an endorsement from O. Gee alone, and, therefore, the plea afforded no answer; and therefore the learned Judge held the plaintiff was entitled to recover, and that, as the plaintiff could not be supposed to know anything of the agreement between the defendants and the two Gees, he could not be called upon to shew consideration given for the note till his title to it was *primâ facie* impeached; and he directed for the plaintiff, and the jury found accordingly.

Leith, in Easter Term, obtained a rule *nisi* for a new trial without costs, unless the plaintiff would consent to reduce his verdict. He moved only on behalf of the defendants Arrol and Fraser.

Cameron, Q. C., objected that the other defendant, Orrin Gee, should be a party to the rule; and also insisted that the verdict was right on the merits.

Leith, contra, argued that though the maker and indorsers were joined by reason of our statute 3 Vic. ch. 8, yet the plaintiff might recover against one or more of them severally, and therefore he was under no necessity to make Orrin Gee a party. He also contended that the last plea admitted that this note was satisfied, the only issue being upon the consideration given by the plaintiff for it.—He cited *Bingham v. Stanley*, 2 Q. B. 117; *Millis v. Barber*, 1 M. & W. 425; *Simpson v. Clarke*, 2 Cr. M. & R. 342; *Prescott v. Levi*, 3 Dowl. 403.

DRAPER, J., delivered the judgment of the court.

Mr. Leith cited *Bingham v. Stanley* as establishing his position that the plaintiff, by tendering issue on the fifth plea, asserting that he gave consideration, admits all the other facts stated in the plea: among others, that the note sued on was satisfied by the agreement and the other note given by the defendant to R. S. Gee and O. Gee.

This position calls for the examination of authorities decided since *Bingham v. Stanley*—such as *Robins v. Viscount Maidstone* (4 Q. B. 811), *Smith v. Martin* (9 M. W. 304),

Bailey v. Bidwell (13 M. & W. 73), Carter v. James (Ib. 137), Elkin v. Janson (Ib. 655), and the rule according to Parke, B., is, that if the note were proved to have been obtained by fraud, or effected by illegality, that afforded a presumption that the party who had been guilty of the illegality would place the note in the hands of another person to sue; and that such proof casts upon the plaintiff the burden of shewing that he was a *bonâ fide* indorsee for value. But in most of such cases the plaintiff replies *de injuriâ* to the plea; whereas here he passes by all the introductory facts alleged in the plea, and simply affirms, in reply to the allegation that there never was any consideration for the indorsement to him, that he took the note for good and valid consideration, and holds it in good faith. Now, taking the more qualified doctrine of Lord Denman, as expressed in Robins v. Lord Maidstone, the admission made in the course of pleading, by omitting to traverse what had been before alleged, must be taken as an admission for all purposes regarding the issue arising on that pleading, whether the facts relate to the parties or to third persons, provided the allegation so made be material. In Smith v. Martin the plaintiff did not traverse the parts asserted by way of defence—he only denied knowledge—and there the court held the burden of the issue was on the defendant, while in Bailey v. Bidwell, where the replication was *de injuria*, the defendant was held to prove the illegality stated in his plea, and then the onus of proving consideration was held to devolve on the plaintiff.

Here the fourth plea rests the defence on the assertion that the plaintiff had notice, which is traversed, and the burden of that issue is clearly on the defendant; while the fifth plea is only answered by a traverse of the assertion that the plaintiff gave value; and in such a replication, my present impression is, that the facts—which neither shew illegality in the inception of the note, nor that it was fraudulently obtained, but shewing it to have been made on a good consideration at first, set up matter in satisfaction and discharge of it—are admitted by the nature of the plaintiff's replication. For, as is said in substance by Alderson, B., in Carter v. James, the plaintiff in his declaration avers an indorsement to himself,

which may mean indorsement for valuable consideration, or mere indorsement in fact by writing the name on the note.— But the pleas shews the defendant means to dispute valuable consideration; and when the plaintiff replies that the indorsement was for valuable consideration, he explains the meaning of the averment in his declaration, and was bound to prove it as an affirmative statement proceeding from himself.

If this view be correct, the plaintiff has recovered a verdict without proving a material issue which devolved upon him. No such question, however, was raised at the trial. But the point in contest was, whether the defendant had a right to claim a verdict for himself on the three last issues, or either of them, because the plaintiff failed to appear to be examined.

Our statute 16 Vic. c. 19, sec. 2, enacts that, whenever one party shall desire to call the opposite party as a witness he shall either subpoena him, or give him or his attorney eight days' notice of the intention to examine him as a witness in the cause; and if the party fail to appear on such notice or subpoena, his non-attendance shall be taken as an admission *pro confesso* against him, unless otherwise ordered by the court or judge, in which or before whom such examination is pending.

It seems to me the attention of the learned judge was not sufficiently directed to the fourth issue, which was, whether the plaintiff took the note with full notice of the circumstances under which the Gees held it. The burden of that issue was on the defendants, but the plaintiff might be the only person who could prove the fact; and, as appears to me, the defendants had a right to his testimony for that purpose; and if this issue had been correctly stated to the learned judge, I apprehend he would probably have taken the same view.

Upon this ground, independently of the view we entertain, we think there should be a new trial, with costs to abide the event.

The objection as to joining the other defendant on this rule has, we think, received a satisfactory answer. His position and liability are not affected by the result of the issues raised by the other defendants.

Rule absolute.

MCKINLEY V. BOWBEER.

Ejectment—Practice at Nisi Prius.

A plaintiff in ejectment having opened his case as heir-at-law of the patentee, relying upon the assumed limited effect of his own deed to defendant, was not allowed to change his ground and shew himself entitled under the Statute of Limitations.

EJECTMENT for lot 10, in the 1st concession of Trafalgar, North of Dundas Street.

At the trial at Hamilton, before Burns, J., the plaintiff opened his case as heir-at-law to his father, who was patentee of the Crown for the whole lot.

The defendant limited his defence on the record to the rear half of the lot, describing it thus :—"Commencing at the distance of fifty chains on a course north forty-five degrees west from the front of the said concession, and at the southerly angle of the said lot; then north forty-five degrees west fifty chains, more or less, to the allowance for road in rear of the said concession; then north thirty-eight degrees east twenty chains, more or less, to the limit between lots numbers ten and nine; then south forty-five degrees east fifty chains; then south thirty-eight degrees west twenty chains, more or less, to the place of beginning."

The lot, it seemed, overran in measurement, and the plaintiff, considering that by a deed which his father, the patentee, had made to the defendant in 1819, and which described the land exactly as above, the defendant could only shew title to the rear hundred acres of the lot, brought this action to dispossess the defendant of anything above that. The learned judge declared his opinion to be that the deed gave to his defendant the full half of the lot, whatever might be its contents; and then the plaintiff's counsel desired to change his ground, and shew his client entitled to the surplus under the Statute of Limitations, for that, notwithstanding his conveyance, he had continued in possession more than twenty years of the piece of land which he claimed in this action; the defendant having got into possession at a later period.

The learned judge refused to allow the plaintiff, after having opened his case upon his strict title under the patent,

to go into a new case resting only on possession under the statute, and the plaintiff took a nonsuit with permission to move against it.

Read moved in accordance with the leave reserved.

Cur. adv. vult.

ROBINSON, C. J., afterwards delivered the judgment of the court.

We think the learned judge had a discretion to refuse to allow the plaintiff to open a new case, and, after resting his case upon his actual title under the patent, and assumed limited effect of the conveyance which he had given, to change his ground and set up a title in himself under the Statute of Limitations, in derogation of the right of the party claiming under the deed which he had himself given.

Rule discharged.

BROWN V. THE MUNICIPAL COUNCIL OF SARNIA.

Overflowing land in repairing highway—Plea of justification by Municipal Council.

CASE against a Municipal Council for overflowing the plaintiff's land. The defendants pleaded that the road eastward and westward of the plaintiff's premises was swampy and unsafe; that it was the duty of the defendants to repair and keep this road in good order, and that in the performance of such duty they committed the grievance complained of, doing no unnecessary damage to the plaintiff.

Held, on demurrer, that it was not necessary to aver that the act complained of was done under a by-law, for that would *prima facie* be presumed, if essential,—but that the plea was bad for not shewing a sufficient justification, as it should have been alleged that the injury was one which the plaintiff was bound to submit to, and that no other course could have been taken for relieving the road.

CASE.—The injury complained of was, that the defendants had conducted the water of certain swamps lying on and across the road to the east and west of the plaintiff's premises into a certain water-course, by which the plaintiff's farm was drained, thereby causing the same to overflow, and injure a portion of his land.

The defendants pleaded that the said road is and always has been one of Her Majesty's public roads, and that it was the duty of the defendants to make and maintain the same in a safe and commodious condition for Her Majesty's subjects

to pass, repass, &c.; that the said road, before and at the said times when, &c., was in divers places eastward and westward of the plaintiff's land wet and swampy, and unsafe for the use of Her Majesty's subjects, &c.; that in order to drain off the said water from the said road, and to render it dry and safe, they did at the same time when, &c., cause to be cut and kept open, and still do keep open the said drain or water-course along the said road, and within the allowance for the same, eastward and westward of the plaintiff's lands, doing no unnecessary damage to the plaintiff; as they lawfully might for the cause aforesaid—*quæ sunt eadem*.

The plaintiffs demurred to this plea, assigning for cause, that no by-law of the said Council or other authority is shewn to justify the acts in the declaration alleged; and that the said plea admits the cause of action in the declaration stated, without sufficiently avoiding the same, and does not shew any defence to the said action.

Hagarty, Q. C., for the demurrer, cited Bac. Abr. "Corporation" E.

Prince, contra, cited Arnold v. The Corporation of Poole, 7 Jur. 653.

ROBINSON, C. J., delivered the judgment of the court.

Supposing it to be clear that the corporation which is defending this action could legally do what they are charged with doing, then we think they could plead in general terms, as they have done here, that they did the act complained of as they lawfully might for the reasons assigned, without setting forth that they passed a by-law under seal authorizing the thing to be done; for if they could only effectually act in that manner, then it will be taken *primâ facie* that they did act by means of such by-law. Their assertion will be taken in the first instance to imply that. The case of *The Corporation of Ipswich v. Martin*, (Cro. Jac. 411,) and of *The Dean and Chapter of Windsor v. Gover*, (2 Saunders 305, and notes,) we think support that principle.

But this plea must be held to be insufficient, we think, both in form and substance; for it does not apply itself directly to the injury of which the plaintiff complains, which is the

bringing down water from the swamps east and west of him into his drain, and thereby causing it to overflow, and to flood his land, injuring the soil and preventing his passing from one part of his property to the other; but the plea merely justifies the cutting and keeping open a certain drain within the public allowance for road east and west of the plaintiff's premises, without either admitting or denying that the drain occasions the plaintiff's land to be flooded, or does him any such injury as he complains of. This is not an action of trespass for digging a ditch on the plaintiff's land, but an action on the case for causing a certain nuisance to his property. It is the alleged nuisance which is the gist of the action; and that either should have been traversed, or should in terms have been confessed and avoided.

Then, if the plea had confessed the occasioning the injury, still we do not think that it can be said to justify it; for although it is reasonable that the rights and conveniences of individuals should to a great extent be made to give way for the public good, yet a necessity must always be shewn to exist for interfering with private rights. This plea cannot be a sufficient defence, unless we admit that the municipal authorities, in order to drain a highway, may bring down water in any quantity upon the land of an individual, and may leave it to rest and stagnate there, or even to produce any amount of evil and inconvenience to his dwelling-house or other buildings, without shewing that the water could in no other way have been got rid of without throwing it on the plaintiff's land, and without shewing that it was not in their power to lead it away from the plaintiff's land after they had conducted it thither.

If this plea as it stands is a defence, then the municipality might at their pleasure drain the highway by turning the water from it upon any adjoining private property, and there leaving it. It is true that they plead here that the drain which they cut is within the allowance for road; that is, they cut no drain on the plaintiff's land; but if by their drain they throw water upon the plaintiff's land which would otherwise never have got there, they occasion him an injury which they must shew he is bound to submit to in conse-

quence of some statutory provisions ; and they must go further, and shew that the circumstances were such as to compel them to take that course for relieving the road from the water, and that they have done no injury to the plaintiff which by proper management and care they could have avoided.

For the want of any allegations of this kind, we think this plea cannot be supported, and that the plaintiff must have judgment.

Judgment for plaintiff on demurrer.

WELLER V. BURNHAM.

Right of tenant for life to cut timber—Pleading.

Case by the reversioner against the tenant for life, for cutting timber. Plea—That the defendant, as the servant of the tenant, and by her command entered upon the lands, and cut down the trees, for the purpose of clearing the land and cultivating the same.

Held, that the plea was bad on special demurrer ; and *semble*, that it was also bad in substance, as shewing no justification.

CASE—The declaration stated that one Hannah Burnham heretofore—to wit, on the 1st of April, 1848—and before, and from thence until and at the time of committing the grievance in this count mentioned—was and still is seized of and in certain lands and premises, situate, &c., in her demesne as of freehold, the remainder thereof in fee during all the time aforesaid belonging to the plaintiff ; yet the defendant, contriving, &c., entered upon the said lands and premises, and felled, cut down, prostrated, and destroyed, and caused and procured to be felled, &c., divers trees, to wit, &c. ; and took and carried away the same, and converted and disposed thereof to his own use ; whereby the plaintiff hath been and still is greatly injured, prejudiced, and aggrieved, in his said estate, interest, and remainder, of and in the said lands and premises—laying the damage at £100.

Fourth plea—That the defendant, as the servant of the said Hannah Burnham, and by her command, entered upon the said lands, as he lawfully might, and cut down, felled, and prostrated the trees in the declaration mentioned, *to and for the purpose of clearing the said lands*, and improving and cultivating the same, upon which the said trees stood and were growing and being, according to the custom of good

husbandy, and the custom of the country in Upper Canada, and thereby increased and enhanced the value of the said land and premises, *quæ sunt eadem*, &c.

Demurrer—The causes assigned sufficiently appear in the judgment.

Weller, for the demurrer, cited Co. Lit. 53a, & 53b.

Wilson, Q. C., contra.

ROBINSON, C. J., delivered the judgment of the court.

This plea is subject to an exception in point of form: namely, that it states no time, either by reference to the declaration or otherwise, when the defendant committed the acts which he justifies.

Then, supposing that it were clearly lawful in this country for a tenant for life to change the character of the estate wholly or in part, at his discretion, from woodland to arable land, stripping it of all its timber—yet it is not averred here that the defendant did actually clear the land and make it fit for cultivation. It is consistent with all that is stated here that the defendant may have cut down the trees and left them lying there. He only says that he cut the trees down *for the purpose of clearing the land*.

The main question, whether a tenant for life can justify cutting timber in order to clear the land, and without stating anything more to shew the propriety or necessity of doing what was done, is not necessary to be determined; but I cannot say I have any doubt that in substance, as well as in form, this plea is bad.

Judgment for plaintiff on demurrer.

WILSON V. LEE.

Arson—Evidence—Malicious prosecution.

CASE for malicious prosecution for arson.

Held, that under the evidence given, the defendant had reasonable ground for suspecting the plaintiff. and that a nonsuit was rightly directed.

CASE, for malicious prosecution of the plaintiff on a charge of arson.

The declaration alleged that the defendant, without any

reasonable or probable cause, made a complaint on oath before a justice of the peace, charging and accusing the plaintiff with having wilfully and maliciously set fire to a certain barn of the defendant, together with a quantity of hay therein; and that the defendant maliciously, &c., caused a warrant to be issued against the plaintiff upon such charge and caused him to be arrested thereon, and detained in custody, and conveyed before the said justice, who upon investigation of the complaint, discharged him.

Plea—Not guilty.

On the trial, at Stratford, before Burns, J., it appeared to the learned judge that want of probable cause was not shewn, and he directed a nonsuit.

Becher moved to set aside the nonsuit.

Cur. adv. vult.

ROBINSON, C. J., delivered the judgment of the court.

On further consideration of this case, we continue of the opinion that the nonsuit was proper. There seems to be no doubt that the defendant had his barn burnt under circumstances which produced a general impression in the neighbourhood that it was the work of an incendiary, and before the defendant made any charge it seems to have been suspected by many that the plaintiff was probably the person who had done it. He had been engaged in a law suit with the defendant, and seems to have been looked upon by disinterested parties as a vindictive person, likely to commit such an act.

If he had a quantity of straw near the barn which he removed just before the fire, as was sworn and not denied, it was a strong circumstance to warrant the man who had suffered such a loss in entertaining the suspicion, which seems to have entered into the minds of many others. The defendant, under such circumstances, had reasonable cause for going as far as to swear that he had ground for suspecting the plaintiff; and he did not take upon himself to go further than to state his suspicion,—he made no positive charge.

Rule refused.

CAMPBELL V. MCCREA.

Promissory Note—Pleading.

Assumpsit on a promissory note, payable to order, by the payee against the maker, *Plea*, loss of the note by the plaintiff before the commencement of the suit, and that he hath been and is unable to produce the same, nor is the said note in his custody or control. *Replication*—That the plaintiff did not lose the said note in manner and form, &c.
eld, on demurrer, replication good.

ASSUMPSIT on a promissory note, made by the defendant, payable to the plaintiff or order.

4th plea—That the defendant has always been ready and willing to pay the said note on the same being produced and given up to him, and that the said note has not been produced or presented to him for payment; and the defendant further saith that the plaintiff, after he became the holder of the said note, and before the commencement of this suit, to wit, on, &c., lost the said note, and thence hitherto hath been and still is unable to find or produce the same, or give up the said note to the defendant on his paying the same; and the said note, from the time when the said plaintiff lost the same, hath not been, nor is the same in the possession, custody, power, or control of the plaintiff; and that the said note at the time when it was so lost was indorsed in blank and not specially, and was transferable by delivery: verification.

Replication—That the plaintiff did not lose the said note, in manner and form, &c.

Demurrer to this replication.

Wilson, Q. C., for the demurrer.

Richards contra, cited *Kemp v. Watt*, 15 M. & W. 672; *Boys v. Joseph*, 8 U. C. R. 273.

ROBINSON, C. J., delivered the judgment of the court.

We should have thought the answer by the plaintiff, "that he did not lose the said note in manner and form, &c., insufficient, because it takes no notice of those allegations in the plea, that the note is not in possession or under the control of the plaintiff, and that he cannot produce it; and this is said of a promissory note, payable to order, and indorsed in blank. The material point in this defence would seem to

be that the plaintiff cannot produce the note ; and whether this really has arisen from his having casually lost it, or from its having been snatched out of his hand, or illegally detained from him by a person who will not give it up, is not the material point of the defence.

But it seems that a similar plea of a lost note has been held to be sufficiently answered by such a replication, and we have certainly no inclination to go beyond precedent in sustaining formal objections. The ground on which such a form of replication has been sustained probably is, that when the plaintiff denies that he has lost the note, he takes upon himself the burden of producing it, and that his denial of the loss must reasonably be taken to involve also a denial of what the defendant has merely assumed to be the consequence of such alleged loss.

Judgment for plaintiff on demurrer.

PHELAN V. FRASER.

Covenant—Pleading—Inconsistent dates.

Action of covenant—Breach, non-payment of £150, which was to be paid by two equal instalments, the first on the 1st of May, 1851, and the second on the 1st of May, 1852.

Second plea—That *on the 22nd of September, 1851*, the defendant made to the infant son of the plaintiff, *a good and sufficient deed in fee* of a certain lot of land, which the plaintiff accepted in full satisfaction and discharge of the breaches of covenant declared on, and of all damages thereby sustained.

Third plea—That the plaintiff ought not further to maintain his action, because, by release under seal, dated the 28th of February, 1853, he released to the defendant the causes of action in the declaration mentioned. *Held*, on demurrer, second plea bad for inconsistency of dates ; and *semble*, also, that it should have been averred that the defendant had some interest in the land conveyed in satisfaction. Third plea good.

This was an action on the defendant's covenant to pay the plaintiff £150, in two equal instalments ; the first instalment to be paid on the 1st of May, 1851, and the remaining instalment on the 1st of May, 1852. Breach, non-payment.

Second plea—That after the committing of the said breaches of covenant, and before the commencement of this suit—to wit, *on the 22nd September, 1851*—the defendant, at the instance and request of the plaintiff, did make, execute, sign, seal and deliver *a good and sufficient deed in fee*, sealed with his seal, &c., to J. P., infant son of the plaintiff, of &c., in full satisfaction and discharge of the said breaches

of covenant, with interest, and of all damages by the plaintiff sustained by reason of the committing thereof; which said deed the plaintiff then accepted and received of and from the defendant in full satisfaction and discharge of such damage, with interest : verification.

Third plea—That the plaintiff ought not further to maintain his action, because, after the making of the said indenture and committing of the said breaches of covenant, the plaintiff, by a certain indenture of release, dated the 28th of February, 1853, sealed with his seal, released to the defendant the said causes of action in the declaration mentioned : verification. Wherefore, &c.

Demurrer to the second plea, because the plaintiff declares for the non-payment of money due in May, 1851, and in May, 1852, and the defendant pleads accord and satisfaction for the same on the 22nd of September, 1851, when the second breach had not taken place; and to the third plea, because it is not stated therein whether the release was given before or after the commencement of this suit, and yet the said plea is pleaded against the further maintenance of this suit, &c.

Cameron, Q. C., for the demurrer, cited *Fralick v. Lafferty*, 3 U. C. R. 159.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the second plea is bad, for the exception specially taken to it, that it avers satisfaction made on the 22nd of September, 1851, of a demand which was not due till September, 1852. A repugnancy of this kind in dates is bad on special demurrer, notwithstanding the times are averred under a *scilicet*, and although the satisfaction is alleged to have been made after the breach, because one part of the plea is inconsistent with the other, and therefore bad in point of form. We incline, also, to think that the pleading that the defendant at the plaintiff's request made a good and sufficient deed in fee of certain land to the plaintiff's son, is not sufficient without setting forth that the defendant had some estate in the land; for there can be no satisfaction without something of value; and the terms, "good and sufficient deed," may refer only to the sufficiency of the conveyance in point of form. If the plea had been that at the

request of the plaintiff, the defendant released to the plaintiff's son all his interest and claim in and to the land, and that the plaintiff accepted the release in satisfaction, we are not prepared to say that that might not have been a good defence without shewing that the defendant had any interest; but it is not material to determine this, for the plea is not to that effect.

We think the third plea may be sustained, for it is clear that it is not pleaded in bar of the whole action, but only against the further maintenance of the suit; and whether the release was given before or after the action was brought, it must equally have that operation. The date is consistent with its being given pending the action.

Judgment for plaintiff on demurrer to second plea,
and for defendant on demurrer to third plea.

CRAWFORD V. BROWNE ET AL.

Carriers by water—"Dangers of Navigation"—Collision—Pleading.

Case against the defendants, as carriers by water, for negligence in conveying the plaintiff's goods. 2nd plea—Goods not delivered *modo et forma*. 3rd plea—That the defendant received the goods on an express agreement that they were not to be in anywise answerable for any loss or damage which might occur in the course of the carriage or delivery; and that the damage happened without any negligence or want of care on the part of the defendants or their servants. It was proved that the loss was occasioned by collision on the lake; and that the plaintiff by his agreement was subject to the risks of navigation.

Held—That the second plea denied only the delivery of the goods; but that on the third plea the defendants were entitled to a verdict.

CASE—The plaintiff declared that defendants were owners of a schooner called the "Vandalia," of which one Trowell was captain; that the plaintiff delivered to the defendants one hundred and one barrels of apples, to be carried by the said schooner from the aqueduct to Windsor, to be there delivered to the plaintiff, for freight payable to the defendants; that it became the defendants' duty to take proper care of, and safely to carry and deliver the same goods to the plaintiff, yet defendants took such bad care, and were so negligent in the carriage thereof, that the schooner was wrecked; and through the carelessness, negligence, and mismanagement of the defendants, the goods of the plaintiff were wholly lost.

Pleas—1. Not guilty. 2. That the goods not delivered to the defendants to be carried *modo et forma*. 3. That the

goods were received by defendants on an express agreement that defendants were not in anywise answerable for any loss or damage thereto which might occur in the course of the carriage or delivery ; and that the damage of the goods happened without any personal negligence or want of care by the defendants themselves, or any gross negligence of their mariners or servants.

Replication—taking issue on the first and second pleas, and *de injuriâ* to the third.

The cause was tried in March last, at Niagara, before McLean, J. For the plaintiff, it was proved that the apples were shipped on board the "Vandalia," to be carried as stated in the declaration. The plaintiff was on board, and it seemed that, if he sold any of the apples at any intervening port, he was to pay the same rate of freight as if they had all been carried to Windsor. On the voyage up Lake Erie the "Vandalia" was run into by the schooner "Fashion," and the vessel and cargo were lost. The bargain for the carriage was made by one Eastman for the plaintiff, and he swore that he did not recollect anything being said to him as to the apples being at the plaintiff's risk. For the defendants the captain of the schooner was called, who swore that the agreement was at 1s. 3d. per barrel, to be delivered at Windsor: that the vessel was to call at Port Stanley, and to go on to Chatham; that the plaintiff was at liberty to sell at any port, or to take them on from Windsor to Chatham,—in either case the freight remaining at 1s. 3d. per barrel; and that he expressly told Eastman the owner of the apples must run the risk of the navigation,—a stipulation which he swore he was in the habit of making. No receipt or bill of lading was signed.

The jury found that the captain received the freight, but that the plaintiff was subject to the risks of the navigation; and, by the direction of the learned judge, gave a verdict for the plaintiff, subject to the opinion of the court; a nonsuit to be entered if the cause of the loss was a danger of the navigation.

M. Vankoughnet obtained a rule nisi to enter a verdict for defendant, or a nonsuit, or for a new trial on the law and

evidence, contending that on the second plea, "*modo et formâ*" put in issue the terms of the contract; or that, if not, under the third plea the issue should on the evidence be found for the defendants, as collision was not a peril of the navigation.

Cameron, Q. C., objected to the latter point being now raised, as at the trial the whole question disputed was, whether there had been the exception as to the defendants' liability set up; if there was, it was not then disputed that the plaintiff failed. He cited Angell on Carriers, sec. 166.

ROBINSON, C. J., delivered the judgment of the court.

If the action had been in *assumpsit* instead of in tort, and the agreement to carry had been stated as it was in this declaration, and if the defendants had pleaded *non assumpserunt*, we think they might have insisted that the special exception in the contract, which they established to the satisfaction of the jury, entitled them to succeed on that issue; but that such plea as has been put in to this action on the case,—that the plaintiff did not deliver the goods to them to be carried *modo et formâ*,—merely denies the fact of delivery of the goods to be carried. The third plea clearly admitted the defence set up, that the goods had been taken on the express agreement that the defendants were not to be liable for the dangers of navigation. The jury found that the risks of navigation were excepted in the contract; and this being so, there can be no doubt that the casualty of collision, occurring as it did here in the open lake, and for all that appears without any gross fault, if indeed any fault, in the defendants or their servants, they were entitled to the nonsuit which they pressed for at the trial: and that this rule should be made absolute.

Rule absolute.

AITKIN ET AL. V. LEONARD ET AL.

3 Vic. ch. 8—*Pleading*.

In an action against different parties to a note, it is not essential to aver a liability or promise to pay, as in the form given by the statute.

ASSUMPSIT by an indorsee against the first and second indorsers of a promissory note. After setting out the note,

indorsements, and notice of non-payment, it was added that the defendants, in consideration of the premises, "*then promised* the plaintiffs to pay them the amount of the said note on request."

Demurrer.—Because the promise is not stated to have been joint and several, and no joint and several liability is averred, in accordance with the form given in the statute.

E. Jones, for the demurrer, cited Nordheimer et al. v. O'Reilly et al. 6 U. C. R. 413, Rob. & Har. Dig. 93.

Eccles contra, cited Grant v. Eyre et al. 2 U. C. R. 426; Acheson v. McKenzie, 4 U. C. R. 230; Whitney v. Woods, 5 U. C. R. 572.

ROBINSON, C. J., delivered the judgment of the court.

This is the case of an action by an indorsee of a promissory note against two successive indorsers, and it concludes with alleging a promise to pay, which was unnecessary; for although it is in the form given by the statute (3 Vic. ch. 8), it may be treated as surplusage, or may be inferred to mean that the defendants successively promised according to the facts stated. We have looked at the cases in our own court which Mr. Jones cited, and do not find that any of them go the length of supporting the exception taken in this case. The case of Nordheimer v. O'Reilly (6 U. C. R. 413) turned upon the allegation of the liability of the defendants, which is matter of law; not, as in this case, upon an alleged promise unnecessarily stated, after the declaration had shewn in what manner the two defendants were parties to the note—namely, by indorsing, which indorsement was in fact an express promise by each severally to pay.

Judgment for plaintiff on demurrer.

SANDERSON V. DOWNS.

Pleading.

CASE for maliciously suing out an attachment in the Division Court, without any reasonable or probable cause of action in respect of the sum of money for which the attachment was issued. *Plea*.—That the defendant had a reasonable and probable cause of action against the plaintiff for the sum of money in the declaration mentioned.

Held, on demurrer, plea bad.

This was an action on the case for maliciously suing out an

attachment in the Division Court against the plaintiff's goods, the defendant not having any reasonable or probable cause of action against the plaintiff in respect of the sum of money for which he procured the order or warrant of attachment to be issued.

The defendant pleaded that he had a good and sufficient and reasonable and probable cause of action against the plaintiff in respect of the sum of money mentioned.

The plaintiff demurred to this plea.

Eccles, for the demurrer, cited *Long v. Lee*, 4 U. C. R. 377.

Hagarty, Q. C., contra, cited *Ellis v. Abrahams*, 15 L. J. (Q. B.) 221; *Hounsfield v. Drury*, 11 A. & E. 98.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the plea demurred to is not a good plea. No doubt many instances are to be found of special pleas in actions for malicious prosecution, setting out a train of facts and circumstances which induced a suspicion of the guilt of the person prosecuted, and which the defendant relied on as furnishing what could be held by the court to be probable cause for instituting the prosecution.

But these pleas have not been admitted without being contended against as amounting to the general issue, because they merely denied argumentatively that want of probable cause which was alleged in the declaration, and which must come in question on the general issue. The court, however, upheld them, on the ground that the special facts which they set forth were proper to be thus referred to the judgment of the court, whose province it was to determine whether they disclosed a probable cause for the prosecution or not. I refer now to *Pain v. Rochester et al.* (Cro. Eliz. 871), and to another case of *Chambers v. Taylor*, (page 900 of the same volume.) In the first case, one of the judges doubted whether the plea was good, amounting as it did to the plea of not guilty; but the other judges held it good, for that the defendant confessed the procurement of the indictment, and avoided it by matter in law; and that, especially, the demurrer being general, the plaintiff should not take advantage of it. In *Cotton v. Browne* (3 A. & E. 312), where the

defendant, after pleading not guilty, added a special plea, going into a long statement of circumstances to shew that he had probable cause for the prosecution, the court on motion, under the new rules, struck out the plea as superfluous, saying that the plea of not guilty was sufficient.

Now in the plea before us the defendant in his special plea goes into no statement of circumstances from which the court could come to any conclusion upon the legal question of want of probable cause. He pleads nothing special, but simply selects one of the essential averments in the declaration—to wit, the want of probable cause—and traverses it. He says “he had a good, sufficient, and reasonable and probable cause of action against the plaintiff in respect of the sum of money in the declaration mentioned.” This was not traversing a fact which he would have been taken to have admitted by pleading only the general issue, but one that is clearly involved in the issue upon “not guilty,” and it is not a special plea of facts and circumstances on which the court could pronounce. We see no reason why such a plea should be permitted.

Judgment for plaintiff on demurrer.

CORNELIUS JOHNSON, THE YOUNGER, V. BOYLE.

Right of way—Pleading—Estoppel.

In an action for obstructing a right of way the defendant justified under a plea that the close over which the supposed way passed was, before the committing of the alleged grievance, a public way, and that such way was shut up by order of the Municipal Council. *Held*—Plea bad, the plaintiff's *private* right of way not being necessarily extinguished by the closing of the public road.

In a fourth plea, the defendant denied the right of way claimed, and the plaintiff replied, by way of estoppel, a judgment in his favour in a former suit with the plaintiff, in which the same right was in question, averring the way claimed to be the same in both actions. *Held*, on demurrer, a good replication, for if the right had been lost by anything occurring since the former action, the defendant should have shewn it.

The plaintiff declared in an action on the case, charging that, before and at the time of the grievances, &c., he was, and from thence hath been, and still is, possessed of a certain close in the township of Markham; and that *by reason thereof*, during all the time aforesaid, he ought to have had,

and still of right ought to have, "*a certain way* from his said close towards a certain close in the said township, and into, through and over the same, towards a certain common and public highway in the township aforesaid, and into the same, and so back again from the same common public highway towards the said close, and into, through, and over the same, and from thence towards the said close of the plaintiff, and into the same, for himself, his servants, horses, cattle, carts, carriages," &c.; yet that the defendant, while the plaintiff was so possessed of the said close, and so entitled to the said way—viz., on the 1st of January, 1852, and on divers other days, &c.—wrongfully stopped up and obstructed the said way, &c., to the plaintiff's damage of £100.

The defendant pleaded, as his second plea, that the close over which the supposed way of the plaintiff passed was part of lot 23 in the ninth concession of Markham, and that so much of the said way as passed over the said Lot No. 23 was a common public highway or road: that the defendant Boyle was possessed, as owner, of the part of Lot No. 23 which lay east of the said road, and one Cornelius Johnson, the elder, of that portion which lay on the west side of the said road, between which portions the said common and public highway, before and at, &c., led from the close of the plaintiff through and over the said other close in the declaration mentioned, being part of Lot 23 aforesaid; that above one calendar month before the committing of the grievances, &c., notice was given, as required by law, of an intention to pass a by-law by the Municipal Council of the said township of Markham for stopping up the said road, which was not one of the original allowances, and had never been vested in Her Majesty; that a by-law was accordingly passed on the 15th day of July, 1851, whereby it was ordained and enacted that the said road, called the Boyle and Johnson road, through Lot No. 23, should be stopped up and no longer used as a public highway, and that the land used for the said road (of which a particular description was given in the plea, as set forth in the said by-law) should be disposed of according to law.

The plea then averred that on the 10th of October, 1851, conveyances were made by the said municipality to Boyle of

all that part of the said highway which lay on the east of the centre of the said Lot No. 23, and to Cornelius Johnson, the elder, of that part of the road which lay to the west of such centre line, for the sum of £12 10s., paid by each, by which said conveyances the said Boyle, and Cornelius Johnson, the elder, became respectively seised of such several portions of the said highway, being at the same time respectively the owners of the east and west halves of the said lot, of which such portions of the said road so conveyed to them formed a part; and that being so seised thereof, the said defendant Boyle, at the said times when, &c., in his own right, and as the servant of the said Cornelius Johnson, the elder, and by his command, did stop up and obstruct that part of the said highway leading from the close of the plaintiff over and upon the said Lot No. 23, and which was such public highway as aforesaid—which are the grievances in the said declaration mentioned; *without this*, that at the several times when, &c., the plaintiff had, or of right ought to have had, such way as in the declaration mentioned from the close of the plaintiff into, through, over, and upon the close in the declaration mentioned, and which said close was part of Lot No. 23 aforesaid, in manner and form, &c.: concluding to the country.

The plaintiff demurred to this plea, objecting that it is an argumentative denial of the right of way claimed, and attempts to justify the obstruction to the private way of the plaintiff by a by-law authorising the stopping up of a public highway; and that no excuse or justification for such obstruction is stated in this plea.

The defendant also pleaded, as his fourth plea, that at the said times when, &c., the plaintiff ought not of right to have had such way as in the declaration mentioned, in manner and form, &c.: concluding to the country.

To this plea the plaintiff replied, setting up as an estoppel to that plea, that on the 31st of August, 1850, this plaintiff impleaded this defendant in an action on the case in the Queen's Bench of Upper Canada (*a*), complaining that before and at the time, &c.—viz., on the 1st of January, 1843, and

(a) See 8 U. C. R. 142.

from thence hitherto, there was, and of right ought to be, a certain common public highway in, thorough, over, and upon a certain close in the township of Markham, in the said district, leading from a certain common and public highway, being the concession road between the ninth and tenth concessions of the said township, across and through Lot No. 23 of the said ninth concession to a certain other common public highway, being the concession road between the eighth and ninth concessions of the said township: that before and at the time when, &c., the plaintiff hath been, and then still was possessed of a certain close near the said highway leading from the said concession road between the ninth and tenth concessions of the said township to the concession road between the eighth and ninth concessions thereof, and had no other means of access from the said close in and to the said concession road except by and through the said highway leading from and to the said road between the eighth and ninth concessions of the said township; yet that the defendant well knowing, &c., and wrongfully intending to shut him out from all means of access and egress into and out of his said close, in, through, over, and along the said highway, leading to and from the said concession road between the ninth and tenth concessions, to and from the said concession road between the eighth and ninth concessions, on the 1st of January, 1843, and on divers other days before the commencement of the said suit, (*i. e.*, before the 31st of August, 1850), wrongfully obstructed the said highway, by placing posts, timber and boards, in and across the same; and thereby prevented the plaintiff from passing along the same, &c.

That in a second count of the declaration in the said action the plaintiff complained, setting forth that before and at the time, &c., he was lawfully possessed of a certain other close, by reason whereof he ought to have had, and then of right ought to have, a certain way "from the last mentioned close of the plaintiff towards a certain close in the township aforesaid, and through and over the same," towards a certain common highway in the township aforesaid; and into the same, and so back again from the said highway

towards the said close, and into, through and over the same, and from thence towards the said last mentioned close of the plaintiff, and unto and into the same, for himself and his horses, carriages, &c., to pass, repass, &c.; yet that the defendant, while the plaintiff was so possessed and entitled—to wit, on the 1st of January, 1843, and on divers other days, &c.—wrongfully stopped up the said last mentioned way, &c., to the plaintiff's damage of £100.

That on the 7th of September, 1849, the defendant in that action pleaded—1st. Not guilty. 2ndly, To the first count, that at the time when, &c., in that count mentioned, there was not of right, nor ought there to be, a common and public highway in, through, over and upon the certain close in the said first count mentioned, situate in the township of Markham, leading from the concession road between the ninth and tenth concessions of the said township, across and through Lot No. 23 in the said ninth concession, to the concession road between the eighth and ninth concessions of the said township, at the place where the defendant so placed and erected the said posts, boards, &c.: concluding to the country. 3rdly, That at the time of the committing the grievances in the second count mentioned, “the plaintiff ought not of right, by reason of the possession of his said close in that count mentioned, nor from thence hitherto ought he to have had, nor ought he of right, by the reason aforesaid, to have a right of way from his said close towards the certain close in the said township in the second count mentioned, and into, through and over the same, towards the highway in that count mentioned, and into the same, and so back again from the same common and public highway towards the said close, and into, through and over the same, and from thence towards the said close of the plaintiff, and unto and into the same, &c., at the place where the defendant made the said obstructions as in the second count mentioned: concluding to the country.

That the plaintiff joined issue on the pleas of the defendant; and that, on the trial of the said issues, the jury found that the defendant was guilty of the grievances in the declaration laid to his charge; and as to the second issue joined between the parties, that there of right was,

and still of right ought to be, a certain common and public highway as in the said first count mentioned, in manner and form as the plaintiff hath in the said count alleged. And, as to the third issue, the jury found that the plaintiff ought of right to have had, and still of right ought to have, a right of way from his said close, as in the said second count mentioned; and they assessed the plaintiff's damages at 1s., for which and for his costs the plaintiff had judgment.

And the plaintiff, in his fourth plea, setting up this judgment as an estoppel, averred "that the way in the said declaration above mentioned is the same way mentioned in the said second count of the said declaration, recovery, record and proceedings in this replication mentioned, and this he is ready to verify; wherefore he prays judgment if the now defendant ought to be admitted against the said record to plead the said plea by him fourthly above pleaded."

The defendant demurred to this replication setting up the estoppel, objecting that it shews no ground of estoppel, inasmuch as the grievances complained of in this declaration are shewn to be, as in fact they must be, other and different from those complained of in the said former action, and committed at a different and later period, when the right of the plaintiff in and to the private way set forth in the declaration in the said former action, for all that appears in the replication, might have been and was terminated or destroyed,—such right not appearing in or by the said declaration or replication to have been a right in fee, or of duration beyond the recovery in the former action," &c.

Cameron, Q. C., for the plaintiff, cited *Brownlow v. Tomlinson*, 1 M. & G. 485; *Vooght v. Winch*, 2 B. & Al. 662; *Outram v. Morewood*, 3 East. 346; *Bright v. Walker*, 1 Cr. M. & R. 211; *Frankum v. The Earl of Falmouth*, 2 A. & E. 452; *Gale on Easements*, 415; *Doe Mills v. Kelly*, 2 C. P. 1.

Connor, Q.C., and *Eccles*, contra, cited *Rex v. Lyme Regis*, Dougl. 159; *Dovaston v. Payne*, 2 H. Bl. 530; 1 Chy. Plg. 257; *Regina v. Chorley*, 12 Q. B. 519; *Moore v. Rawson*, 3 B. & C. 337; *Doe v. Wellsman*, 2 Ex. 368; *Ingleton v. Burges*, Comberbach 166; *Carter v. James*, 13 M. & W. 137.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the second plea in this case is insufficient, Where new matter is stated in a plea as inducement to a special traverse, such new matter must appear to be sufficient in substance to defeat the opposite party's allegation.

Here the defendant sets up in denial of the plaintiff's alleged right of way from his own land across a certain close to a public way beyond the close, that the close through and over which the supposed way of the plaintiff from his close passed was, before the committing of the grievances, &c., a public highway, and the defendant avers that this public way was by the due exercise of legal authority closed by a by-law of the Municipal Council of the township, and part of it sold to Cornelius Johnson the elder, and part to this defendant, in pursuance of the statute which authorises the sale of the condemned road in such cases; and he claims that, this having taken place before the alleged trespass complained of, *locus in quo* became the private property of Cornelius Johnson, the elder, and of the defendant respectively, and that he of his own right, and as servant of Cornelius Johnson, the elder, stopped up the road.

It is objected on the plaintiff's side that what he complains of is the obstruction of a private right of way from his close to a certain common and public highway, which he claims only by reason of the possession of his close; and that he could not be deprived of the right by any such act of the Municipal Council as is set forth, because that could only make it no longer a common public highway, and could not extinguish the peculiar right of any individual, which he might have independently of the former existing right of the public.

The objection, we think, is well founded. All that is contained in the plea may be true, and yet the plaintiff's right, if he had such a one, would not be affected by it. He might have had a right by grant antecedent to the establishment of the same as a public road, and in that case the shutting up the road by public authority would not exclude him, but would leave him in possession of his original right.

The fourth plea denies the right of way on which the plaintiff declares, and the plaintiff meets that denial by

setting up an estoppel by a former judgment in an action between the same parties, in which the alleged private right of way in the plaintiff was in question; and this he relies upon as estopping the defendant from now traversing the right of way alleged in this plea. The defendant demurs to this replication setting up the estoppel, and he contends that the verdict in the former action can be no estoppel, because it only established that the right claimed in that action existed at the time when the obstruction complained of in the action occurred.

Except in that particular, nothing can be more precise than the identity of these issues in the two actions, which turned upon the alleged right of way. The descriptions of the way claimed in both actions are precisely the same, and there is the direct averment in this replication that they are in truth the same, and that averment was clearly necessary, from the very general terms in which the way is described.

There could be no ground for questioning the application of the estoppel, unless it be that which the defendant has taken—that the points of time are different. It is quite true that the plaintiff might have had a private right of way in 1850, which he ceased to have in 1852; but the possibility of this being so is no objection to the estoppel in the first instance. The judgment in the former action established, that up to the time of bringing that action the plaintiff had, *by reason of his possession of his own estate*, a right of way over the close in question, to the public highway referred to in both actions. The same possession in the plaintiff continued to this time would be attended with the same right of way, unless he has in some way divested himself of it. The same state of things will be assumed to continue till the defendant shews the fact to be otherwise. The plaintiff can do no more before the trial than assert that the right continues (if such an assertion be necessary), and he does that in his pleading, in which he complains of an injury to the same right, which he claims to hold, as he did before, by reason of his possession of the adjoining close. That he had that right in 1850 was determined in the other action; and if, by anything that has occurred since, the right to the one no longer follows the possession of the other, it is for the opposite party to shew that, and it would destroy the

effect of the estoppel. As it stands, we take the replication to be good.

Judgment for plaintiff on demurrer.

JAMES FRASER V. SIMON FRASER.

Agreement—Construction.

Held, that upon the agreement set out below, the plaintiff (the deputy sheriff) was entitled only to his share of the fees actually received by the sheriff, or in his office; except with regard to such fees as might not have been collected owing to some act or omission of the sheriff.

This was a case arising upon the construction of an agreement, by which the defendant engaged to employ the plaintiff as deputy sheriff, and the plaintiff agreed to serve under him in that capacity.

The following are the parts of the agreement material to be noticed :

“And it is further agreed between the said parties hereto, that, in consideration of the services of the said James Fraser, the said Simon Fraser shall allow to him the said James Fraser, as a remuneration therefor, the following moiety of the *emoluments* of the sheriff’s office, viz.: one half the fees of travelling on and service of all writs that *pass through* the sheriff’s office; one-half the fees and poundage on all writs of execution, except executions against land, as hereinafter excepted ; one half of the fees on all sales of lands for taxes ; one-half the allowance per day in conveying prisoners to the penitentiary or out of the district, but this allowance only when such services are performed by the deputy sheriff ; one-half the fees in the bankrupt court ; one-half the allowance for summoning grand and petit jurors and special jurors ; one-half the allowance for common jurors in civil cases. And it is further agreed between the said Simon Fraser and the said James Fraser, that the following allowances shall belong exclusively to the sheriff, the said Simon Fraser, and that the said James Fraser shall have no claim, or title, or right to any proportion thereof.
* * * * That the said James Fraser shall employ trustworthy bailiffs under him, and for whose proceedings it is understood and agreed hereby that the said James Fraser hereby binds himself to be responsible, and that he will pay such bailiffs out of the moiety of the fees hereinbefore granted to the said James Fraser as the consideration of his said services,—and also, that the said James Fraser shall, out of the moiety of the fees so allowed to him, pay one-half of the expenses of the printing of the sheriff’s office.”

Upon this agreement was endorsed the following :

“NOTE.—It is hereby agreed upon that from and after the 15th day of August, A.D. 1849, the date of the bond filed by the within named James Fraser, deputy sheriff, the fee for filing all writs and

papers in the sheriff's office, in which the said deputy sheriff participates, shall be equally divided between the said sheriff and his deputy, James Fraser."

And also a memorandum extending the term of engagement, in which was contained the following stipulation:

"In addition to the fees allowed to the said James Fraser under the said agreement, the said Simon Fraser agrees hereby to allow to the said James Fraser, for the said extra term created hereby, the following, viz.: one-half of the fees on sales of lands or executions, except those now in the *Gazette*, and one-half the fees on jurors sworn in civil and criminal cases."

At the trial a verdict was taken for the plaintiff, subject to the opinion of this court, whether, by the legal construction of the agreements, the plaintiff's right of action for the recovery of a moiety of the fees and emoluments in the said agreements referred to accrued to him before the defendant had himself received or recovered those fees; or whether, on the other hand, the plaintiff's right to such moiety depended on the receipt thereof by the defendant; and it was agreed that the accounts should be referred to certain arbitrators, to settle the amount due, upon the principle of construction adopted by the court.

Eccles for the plaintiff. *Richards* for the defendant.

ROBINSON, C. J., delivered the judgment of the court.

We think that, under the agreement in this case, the deputy sheriff can only claim the share therein agreed to be allowed to him of such fees for services of all kinds as shall come into the sheriff's hands, or shall have been received in the sheriff's office, or by any person authorised to receive such fees on behalf of the sheriff, unless it can be shewn that the failure to collect any fees due to the office has arisen from some act or omission of the sheriff, in which case the deputy should not be prejudiced by such act or omission, but should be allowed his proportion of such fees in account, in the same manner as if they had been collected; provided the failure to collect them is wholly attributable to the sheriff, and in no degree to the deputy himself.

The case cited on the argument, of *Bull v. Price* (7 Bing. 237) does apply in some measure in support of this construction; but in every such case the question must turn on the

terms of the instrument construed with a view to the transaction and description of employment.

According to what the plaintiff contends for, his claim would arise on the performance of the service by him, whether such service should produce anything to the sheriff's office or not, but in that case he could have sued for it as soon as the service was rendered, without waiting till the fees in the ordinary course should come into the sheriff's office. That certainly could not have been intended by the parties. It is a strong fact, too, that the deputy is to have one-half of all fees for service of all process that *passes* through the sheriff's office, so that if the sheriff himself should serve, the deputy could still claim his proportion of the fee. This shews that it was not the service that was to entitle the deputy to the fee, but that his claim to it arises under the agreement which gives him a proportion of the "*emoluments*" of the sheriff's office, which term "*emoluments*" we take to mean moneys received, and not claims which have not been, or cannot be realized.

SMITH V. MCKAY.

New trial.

In an action for malicious arrest, the court refused to set aside a fourth verdict for the plaintiff, although wrong—alleging as one reason, that the defendant should at least have obtained a special jury.

CASE for malicious arrest on a *ca. re.*

First count, founded on the averment that the defendant had no reasonable cause to arrest for such amount as he did.

Second,—That he had no reasonable cause for swearing that he believed the plaintiff was immediately about to leave Upper Canada, with intent to defraud his creditors.

This was a fourth trial. The judgments of the court setting aside the second and third verdicts for the plaintiff will be found in vol. x. of these reports, pages 412, 613, where the facts of the case are fully set out.

The evidence was in substance the same as on the former trials, and the jury again found for the plaintiff, and £25 damages.

Eccles moved for a new trial, on the ground that the verdict is against law and evidence, and the judge's charge, and perverse.

Cur. adv. vult.

ROBINSON, C. J., delivered the judgment of the court.

The court having so repeatedly interfered for relief of the defendant, he should at least have done all he could to obtain a jury likely to be free from prejudice, and should with that view have had a special jury. The verdict is certainly wrong. If we look to the second count, a verdict for the plaintiff on that would have been in disregard of the judge's charge as to probable cause, which is for the court to decide upon. We must, therefore, look on it as rendered on the first count, and in that view it can hardly be said to be against the judge's charge, for the learned judge rather encouraged a finding for the plaintiff on that count, though he fluctuated in his opinion.

We think the defendant had better let the matter rest where it is. The juries have all evidently taken an unfavorable view of his transaction with the plaintiff. They have thought that he dealt hardly and unfairly with him in some respects, and that he should rather have risked losing his debt than have arrested him for the amount of the note; though his right of action on the note was in strictness undeniable, the plaintiff being left to seek for his redress in a cross action.

We think we should interpose no further.

Rule refused.

DAVIS V. MCGIVERN.

Award—Evidence.

The plaintiff and defendant having a dispute about an agreement between them, after talking over the matter in presence of one M., referred it to him to determine; and M., having heard their statements, awarded that the defendant should pay to the plaintiff £25. Subsequently, at the request of the plaintiff's attorney, he made a written award to the same effect, and delivered it to the parties—the plaintiff having sued as upon a verbal submission.

Held, that it was not necessary to produce the written award, as it appeared from the testimony of the arbitrator that the verbal decision was in fact his award and so intended.

DEBT on award, as upon a parol submission, whereby the arbitrator awarded that the defendant should pay the plaintiff £25—with a common count on an account stated.

The defendant pleaded, among other defences, that the defendant revoked the submission before the award stated in the first count was made.

At the trial at Hamilton, before Burns, J., it appeared

that the defendant had agreed to build a house for the plaintiff, and failing afterwards to go on with his contract, a dispute arose between them, and after talking over the matter in presence of one McDonell, they referred to him to determine between them; and McDonell, having heard their statements awarded at once that the defendant should pay the plaintiff £25. This took place some time in October, 1852. The arbitrator was examined at the trial and swore that the submission was never revoked. A few days afterwards, the arbitrator, at the suggestion of the plaintiff's attorney, made a written award and delivered it to the parties, to the same effect as the verbal award which he had before made in their presence.

The defendant's counsel objected that the plaintiff could not recover without producing the written award, and that the verbal award relied on did not amount to an award, but should be looked on merely as an expression of opinion of the person referred to, and not as a direction which he had authority to make.

This objection was overruled, and a verdict found for the plaintiff.

Martin moved for a new trial. He cited *Boyd v. Emmer-son*, 2 A. & E. 184.

ROBINSON, C. J., delivered the judgment of the court.

According to the testimony of McDonell, which was corroborated by other evidence, there was a submission to him as arbitrator to determine the dispute by making an award, and an award made, and no revocation. The subsequent writing was an immaterial nugatory act. We see no ground for a rule.

Rule refused.

HARRINGTON V. EDISON.

Award—Uncertainty—Reference to third parties.

All differences concerning the renting of a farm by the defendant to the plaintiff, and all other matters in dispute between them, were referred to arbitrators, who awarded that the hay in the defendant's barn cut by the plaintiff, after deducting the hay borrowed by the plaintiff in the then last spring, and a quantity of hay out of it sufficient to winter all the stock in the plaintiff's possession belonging to the defendant, should be divided between them equally: that the straw grown by the plaintiff on the place of the defendant, should be equally divided between them that the fattening pigs then in possession of the plaintiff should be killed and equally divided, and that the two brood-sows and pigs should be equally divided; and in order that an equal division of all these things should be made as above described, they ordered that the defendant and the plaintiff should select two disinterested persons from the neighbouring farmers whose decision should be final. And they further awarded the sum of £150 cy. to be paid to the plaintiff by the defendant on or before the 1st of February, 1852, &c., &c.

Held, that the award was bad for the delegation to third parties, and for uncertainty; and that the plaintiff could not recover the sum directed to be paid to him, that part of the award not being separable from the rest.

DEBT on bond. The defendant craved oyer, and it appeared that the bond was given for the performance of the award of certain arbitrators, to whom all differences concerning the renting of a farm by the defendant to the plaintiff, and all other matters in dispute between them, were referred; so as the award in writing under their hands and seals should be ready to be delivered to the said parties on or before the tenth day of December then next.

The defendant pleaded that the arbitrators made no award.

The plaintiff replied that the arbitrators, within the time limited for that purpose, to wit, on, &c., "did duly make and give their award in writing under their hands and seals, ready to be delivered to the said parties in difference, of and concerning the premises in the said conditions mentioned and so referred as aforesaid, by which they awarded that the quantity of hay then in the barn of the defendant so cut by the plaintiff, *after deducting the hay borrowed by the plaintiff in the then last spring, and a quantity of hay out of it sufficient to winter all the stock in the said plaintiff's possession belonging to the defendant*, the surplus should be divided between them equally; that all the straw grown by the said plaintiff on the place of the defendant should be equally divided between them; the fattening pigs then in possession of the plaintiff should be killed and equally divided; *also the two brood-sows*

and pigs to be equally divided. In order that the hay, the straw, the fattening pigs, and sows and pigs, be equally divided as above described, they ordered that the said defendant and the plaintiff should select two disinterested persons from the neighbouring farmers, whose decision should be final. And it was ordered further, that all the expenses and charges attending the evidence in the said matter on the part of the defendant should be paid by the said defendant, and all the expenses and charges attending the evidence in the said matter on part of the plaintiff should be paid by the said plaintiff. *And they further ordered and awarded the sum of one hundred and fifty pounds currency to be paid to the plaintiff, by the said defendant, on or before the first day of February, one thousand eight hundred and fifty-two.* They also ordered and determined that the said plaintiff should leave and deliver back to the said defendant, on or before the first day of January then next ensuing, the land and tenements which he had occupied, and also remove all the hay and straw which should be divided as thereinbefore awarded to the said plaintiff, on or before the first day of January, A. D. 1851, to wit, meaning and intending the year of our Lord one thousand eight hundred and fifty-two; so that the said defendant might have full and undisturbed possession of both his farms, or of all and every part which the plaintiff had enjoyed or worked. And they further ordered that the plaintiff should pay the sum of twenty pounds costs on the said arbitration." The plaintiff then alleged that the defendant had notice of the said award; but that although he the defendant had in all things fulfilled and kept the same on his part, yet that the plaintiff did not pay the said sum of £150 as awarded.

The defendant demurred to this replication, alleging that the award therein set out did not settle the matters in dispute referred, and was bad for uncertainty.

Read, for the demurrer, cited *Fisher v. Pimbley*, 11 East 188; *Adcock v. Wood*, 20 L. J. (Ex.) 435; S. C. 6 Eng. R. 570.

Cameron, Q. C., contra.

ROBINSON, C. J., delivered the judgment of the court.

The demurrer in this case is in our opinion entitled to

prevail. The award is bad as not being final, but delegating to others the decision of some of the matters in controversy—or rather, directing that the parties should refer such matters to the arbitration of others; and in other respects it is vague and scarcely intelligible, besides being altogether objectionable on the ground of uncertainty.

It appears to us, further, that the parts of the award which are objectionable, are not so clearly separable from those which are unobjectionable as to enable us to say that the amount of money awarded to be paid by the defendant to the plaintiff, and which is sued for in this action, may not have been materially affected by the arrangements proposed to be made for the division of the property, which arrangements are so uncertain and exceptionable that the award cannot be sustained as regards them.

The case of *Tomlin v. The Mayor of Fordwich*, 5 A. & E. 147, is in principle much like the present; I refer also to *Storke v. De Smeth*, Willes 66.

Judgment for plaintiff on demurrer.

MALONE V. FAULKNER.

Obstruction of water-course—Evidence not supporting declaration—Fence viewers, 8 Vic. ch. 20, secs. 12, 13.

The plaintiff and defendant owned adjoining lots in the township of G. There had been for some years a drain or ditch across the defendant's land, into which the water was led by another ditch from the front part of the plaintiff's land. The plaintiff, in order to drain a newly cleared field at the back of his farm, opened a small ditch connecting the field with the old drain across the defendant's land; and at the same time for the purpose of shortening the water-course, he cut off an angle of the old drain. He then applied to the persons acting as fence-viewers for the township, to examine the award, as between him and the defendant, how the draining of their lands should be arranged; and both parties attending, they examined the lands, and by a written award ordered in what manner the drainage should be in future provided for; and that until these arrangements were completed, the drain lately cut by the defendant should be allowed to remain open. This award was not carried out; and in the following year the fence-viewers were again called upon, and made a second award, in some respects differing from the first. The defendant then placed a dam across the small ditch by which the plaintiff had shortened the course of the old drain, and through which the water had been running from the plaintiff's field; and for that obstruction this action was brought.

The declaration stated that the plaintiff was of right entitled that the water collecting upon his land, should be drained off, and run from thence into and through a certain drain called "*the old drain*," and from thence through other drains into the river J.; yet that the defendant, well knowing, &c. placed large quantities of earth, &c., across the said drain, and thereby obstructed the same, and penned back the water upon the plaintiff's land.

The jury found for the plaintiff, and 6d. damages, saying that their verdict was founded upon the award.

Held, that the evidence did not support the case declared upon, and that a verdict must be entered for defendant; for it was not "*the old drain*" which was obstructed (as stated in the declaration), but the new cut made by the plaintiff; and as to the award, the effect of that was only to allow this new cut to be kept open for a certain time; whereas the verdict, if sustained, would establish a right in the plaintiff to keep "*the old drain*" open for ever.

Held, also, that it was unnecessary to prove the regular appointment of the fence-viewers; and that their award was binding under 8 Vic. ch. 20.

CASE for obstructing a water-course, and thereby causing the water to overflow the plaintiff's land.

In the first count, the plaintiff charged that he was possessed of certain lands in the township of Goulburn, in the county of Carleton, and was and still is of right entitled that the waters from time to time collecting and being in and upon the lands of the plaintiff should run, and be drained, and carried off from his land, unto, and into and through *a certain drain or water-course in the county aforesaid, called "the old drain,"* and from thence, through other drains and places, unto and into a certain river called the river Jacques or Goodwood, in the county aforesaid; yet that the defendant, well knowing, &c., but intending to injure the plaintiff, while the plaintiff was so possessed of the said lands, and so entitled as aforesaid, viz., on the 1st of May, 1852, wrongfully put, placed and threw divers quantities of earth, stone, timber and rubbish, in and across *the said drain or water-course*, and lower in the said drain than the said lands of the plaintiff; and there kept the same for a long space of time, viz., for 20 days, &c., and until the same was removed by the plaintiff; and thereby wrongfully stopped up and obstructed the said drain or water-course, and kept and continued the same obstructed; whereby divers large quantities of the water, which from time to time during that time collected and were upon the plaintiff's lands, were prevented from running, and being drained and carried off from the plaintiff's lands, into and through the said drain or water-course, as they otherwise might and would have done, and were penned in and driven back upon, and flowed and ran into and upon the lands of the plaintiff—alleging special damage from spoiling the growing crops, &c.

In a second count, the plaintiff averred that he was possessed of certain other lands in the township of Goulburn ; and had the right to have the water run and be drained off from his lands by and through a *certain other drain called "the old drain,"* and from thence through other drains, into the river Jacques or Goodwood ; yet that the defendant, well knowing, &c., whilst the plaintiff was so possessed of the said last mentioned land and premises, and so entitled, &c., viz., on the 15th of May, 1852, and on divers other days and times between that day and the commencement of this suit, wrongfully placed earth, stones, &c., in and across *the said drain* or water-course, and kept the same back for a long space of time, to wit, from thence until the commencement of this suit, and thereby wrongfully obstructed the said water-course during all the time aforesaid—laying special damage by overflowing the plaintiff's land, destroying his crops, &c.

Pleas—1. Not guilty, to the declaration.

2. To the first count, that the plaintiff was not at the said time when, &c., and is not lawfully possessed of the said lands in that count mentioned.

3. That the plaintiff was not entitled to have the waters carried off and discharged from his lands into and through the said drain or water-course, in manner and form, &c.

4. To the first count, that *the plaintiff*, before the commencement of this suit, and after the defendant had thrown the stones and rubbish into and across the drain or water course, as in that count mentioned, voluntarily removed the same, and thereby wholly abated and removed, the obstruction.

5. To the second count, that the plaintiff was lawfully possessed of the lands in the said count mentioned.

6. That the plaintiff was not entitled to have the water carried off and discharged from his lands into and through the said drain, &c., as in that count mentioned.

The plaintiff replied to the fourth plea to the first count, traversing the alleged abatement and removal of the nuisance by the plaintiff ; and he joined issue on all the other pleas.

At the trial at Bytown, before Macaulay, C. J., the facts appeared to be these: The plaintiff possessed the east half of lot No. 28, in the 8th concession of Goulburn, and the

defendant the west part of lot No. 29, in the same concession.

The lots number from west to east, so that the possessions of these parties joined each other. The land in that vicinity is low and wet; and from the west above the plaintiffs land the water flows naturally to the eastward across his lot and the adjoining land of the defendant, and so across two or three other lots until it makes its way to the river Goodwood.

The evidence was to the effect that the water-shed was towards the east, across the defendant's lot, though there was some contradiction upon the point whether the water had originally any clear natural course through to the river, or whether it was not detained upon the intervening land. There had been for a few years a drain or ditch made across the defendant's land, into which the water was led by another ditch from the front part of the plaintiff's land. About two years ago the plaintiff had cleared a field further back in his lot than his former clearing, and in order to carry off the water from this field which lay adjacent to the defendant's land, he opened a small ditch connecting with the ditch along which the water was used before to pass out of his land; and for the purpose of shortening the watercourse he cut off an angle in the former ditch which had been dug for some distance along the division line between him and the defendant before it turned off to the drain which had been cut some years before through the defendant's field. While things were in this situation the plaintiff applied under the statute 8 Vic. ch. 20, secs. 12 and 13, to the persons acting as fence-viewers for the township to examine and award as between him and his neighbour the defendant what should be done in regard to the draining the plaintiff's land; and in October, 1851, they examined the lands, both parties attending, and awarded in writing that the drains which were at the time open across lots 28 and 29 should be made of a certain specified depth and width on or before the 12th of July of the following year—"and that the small drain across Andrew Faulkner's (this defendant's) lot, and down to the creek in Robert Faulkner's lot, should be sunk one foot deep, and remain open till the main drain should be com-

pleted ;" and this small drain across the defendant's lot to a creek in the land next below him was to be made by this plaintiff Malone, and finished by the first of the following month of November.

In point of fact the two larger drains first spoken of in this award were not made as this award directed, but matters were left as they were. In the following spring, there being still a dispute between the parties about the water-courses, the fence viewers were again called upon, and on the 12th of May, 1852, they examined the ground and made another award, in which they prescribed the dimensions of three watercourses which they directed should be dug across the lands of this plaintiff and the defendant, and of other proprietors below them ; and they appointed at whose expense the different portions should be made. They directed further that a drain should be sunk on the side line between this plaintiff and the defendant, from the creek near the front of their lots up to the drain in Malone's wheat field, to be made by the two in equal proportions.

A few days after this latter award was made, the defendant placed a dam across the small ditch through which the water had been running from the plaintiff's wheat field into the defendant's lot, No. 29, which had the effect, as the plaintiff's witnesses swore of keeping back the water, and injuring to some extent the plaintiff's growing wheat. For that act this suit was brought. In some respects the evidence was contradictory. The plaintiff's witnesses swore that if there had never been any ditch there such as that which the defendant obstructed the water would by a natural course have run off the plaintiff's land upon the defendant's ; that the ditch brought it down more quickly, but in a manner less injurious to the defendant by confining the channel ; and that the dam put across the ditch by the defendant threw back the water on the plaintiff more than would have been the case if the ground was left in its natural state.

The defendant's counsel objected that the plaintiff had at common law no right to have the water drained off from his land by the small ditch spoken of, and which the defendant had filled up with earth just where it crossed the division line between the two properties. It was clear from the evidence

that no prescriptive right to an easement was shewn, from lapse of time. And, as to the effect of what was done by the fence viewers, it was objected that the plaintiff could not rest upon any right acquired through their award, because it was not shewn that they had been legally appointed fence viewers. The statute 12 Vic., ch. 81, sec. 31, sub-sec. 5, makes it necessary that their appointment should be under the corporate seal of the township; and for all that appeared, these fence viewers had been no otherwise appointed than by a mere resolution. It was contended, also, that the award at any rate could not affect this case.

The learned judge told the jury that by common law the plaintiff had a right to have the natural flow of water from his land unobstructed by any act of the defendant; and that, besides this, he would have the right, under the statute referred to, if the fence viewers' award could be held to have been such as could confer it, which he inclined to think it was, because they sanctioned the continuance of the existing small drain which led directly out of the plaintiff's wheat field to the larger drain which had been made some years before across the defendant's lot, directing that it should continue till certain work was done to the other drains, which would render its further continuance unnecessary. The jury were out long, and seemed perplexed with the case; and at length they came in with a verdict for the plaintiff, saying that they found for him under the award—that is, that, according to the award, the plaintiff had a right to have the small drain from his wheat field left open until those changes had been made which the fence viewers had directed. They found no damages, however; but the learned judge told them that without some damages their verdict would be incomplete; and, if the plaintiff had a right to have the flow of water along the drain in question continue unobstructed, and if that right had been infringed, he was entitled to some damages, though they might be merely nominal. They returned again and brought in a verdict for the plaintiff, with 6d. damages, declaring that they found for the plaintiff in consequence of the statute and the fence viewers' award, and assuming that to be legal.

Eccles obtained a rule *nisi* for a new trial on the law and

evidence, or to enter a verdict for the defendant on the leave reserved. He cited Angel on Water-courses, sec. 426, and the cases there collected; *Regina v. Fall*, 1 Q. B. 636; *Feize v. Thompson*, 1 Taunt. 121.

Wilson, Q. C., shewed cause, and cited *Bower v. Hill*, 1 Bing. N. C. 549; *Smith v. Cartwright*, 20 L. J. (Ex.) 401, 6 Eng. Rep. 528. The statutes cited with reference to the award are noticed in the judgment.

ROBINSON, C. J., delivered the judgment of the Court.

It is a pity that these parties should be involved in a tedious and expensive law suit about so mere a trifle. The jury very reluctantly found 6d. damages, not being satisfied that there had been really any injury sustained; and there is no permanent right involved, because a few hours' labor would have opened a passage for the water along the side-line on the course which the fence viewers suggested, by which it could be led through the land of both parties, in such a manner, and upon such terms as to expense as has been awarded by the fence viewers, who are made judges in these matters; and when this shall be done, the difficulty will be removed. The award of the fence viewers was reasonable—that the course should be left open as it was till the other drain was dug, for which a time was limited. It was captious in the defendant to dam up this small ditch before the other was made, for, according to the evidence, it only brought the water more freely and directly, along a low ground, through the land of both parties, where there was always a natural water shed. By digging a ditch the flow of water would be more confined, and do less injury to the defendant; and when the defendant, notwithstanding, took upon himself to block up the ditch, he occasioned some injury to the plaintiff, which, however trifling, could hardly have been suffered but for that obstruction; and the ditch which the plaintiff had dug could not have added to the injury, whatever it was, but would rather have a contrary tendency. I refer on these points to the evidence of Lewis and of Cathcart. The merits of the case seem to be with the plaintiff, though, as the facts appear to us, it could not have been worth his while to bring an action.

He would have done better to have set himself to work in leading off the water in the manner the award suggested. We think the award of the fence-viewers was binding under the statute 8 Vic., ch. 20, secs. 12 & 13; and though there was no evidence of their regular appointment, it is sufficient that they were the officers *de facto* to whom both parties submitted themselves for settling the dispute between them. We think, too, that the effect of their award was to give the plaintiff a right to have the water run along the artificial course which had been made for it until the new ditch directed by them should be opened.

But the difficulty is, that the evidence does not sustain the declaration. We cannot hold it to have been proved that the defendant obstructed (as he is charged with doing) "*the said drain* or water course, whereby the water otherwise would and ought to have run from the plaintiff's land," because the words, "the said drain" are only referable, according to the statements in the declaration, to "a certain drain or water course called *the old drain*, through which the water from the plaintiff's land used to run through other drains and places to the river Jacques;" and what was obstructed was a new cut made by the plaintiff but a short time before in place of the old drain, and intended to lead off the water by a shorter route.

It was not a part of the old drain itself. Taking the course altogether as it existed at the time of the award, it may be said, we think, that the fence-viewers sanctioned it, and allowed it to continue till the other drain which they described should be finished, and so that they gave the plaintiff a right to leave it open in the meantime. This maintains the right, however, solely on the ground of the award, and the jury found their verdict only on account of the award, as they expressly said. But the plaintiff should have placed his claim to the privilege upon a proper legal foundation, and should have described accurately the wrong of which he complained. He should have stated that he had cut a drain across his own land, leading into the land of the defendant, and over his land to an old drain by which the water used to run through the defendant's land; and he should have shewn that by the award

of the fence-viewers he had a right to have this drain lately cut by him into and through a part of the defendant's land left open, so that the water might run through and along it to the old drain; and that the defendant had wrongfully obstructed it.

Instead of that, he claims a common law right, not qualified as to time, but perpetual, to have the water run from his land into and through a drain called "the old drain" on the defendant's land, and he complains that the defendant dammed up that drain; that is, "*the old drain*,"—not the new cut which the plaintiff had made leading into the old drain, and which was in fact the water-course that was obstructed. If this verdict should stand as the declaration is framed, it would establish a right in the plaintiff to keep the old drain open for ever; whereas the plaintiff only succeeded by shewing that, by an award of fence-viewers, he had a right for a few months to have the water flow through a new cut which he had made leading across his own land, and part of the defendant's land, into the old drain which had existed for some years on the defendant's land.

I was inclined to sustain the verdict if we could properly have done so; but after some hesitation, I concur with my brothers, who, I believe, are of opinion that we should make absolute the rule for entering a verdict for the defendant, on the ground that the evidence did not support the case which the plaintiff declared upon.

Rule absolute for entering verdict for defendant.

BARROW V. THE ONTARIO, SIMCOE, AND HURON RAILROAD COMPANY.

An original shareholder in the O. S. & H. R. R. Co. having, after the passing of 16 Vic., ch. 51, paid the calls before then made on his shares, and voted at a meeting of shareholders, was held precluded from claiming the repayment of his instalments under the fourth clause of the act.

This was an action of debt brought by the plaintiff under the 16 Vic., ch. 51, against the Ontario, Simcoe, and Huron Railroad Company, in which he was an original shareholder, to compel the repayment of the instalments paid by him on his shares.

It seemed that all the calls except the first deposit were made before this statute was passed altering the defendants' charter, but the plaintiff did not pay the calls till afterwards; and the payments were made, as averred by the defendants in their plea, with a full knowledge of the provisions of the act, though the declaration was so framed as to allow it to be inferred that the payments as well as the calls were all made before the statute.

The plaintiff demurred to the plea, thereby admitting the defendants' assertion in this respect; and the question was, whether the plaintiff, having paid the calls and voted at a meeting of shareholders under the altered charter, had not made such an election as to preclude him from withdrawing and reclaiming his money under the privilege given by the fourth clause of the statute.

Cameron, Q. C, for the plaintiff. *Vankoughnet*, Q. C., for defendants.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the plaintiff in this case is barred by his election. To allow him to reclaim money which he voluntarily paid after the act was passed would be inconsistent with what we must suppose to have been the intention of the act; and, of course, if the plaintiff cannot now withdraw from the company altogether, he can no more reclaim the £12 10s. first deposited than the subsequent calls.

It was just in the legislature, when they had made such extensive changes in the charter under which the subscribers had advanced their money, that they should afford to all those who were not content with those changes an option to withdraw from the undertaking, and receive back their money.

But it would have been unjust and unreasonable to have made such a provision as would have allowed any of the stockholders to take advantage of the provisions of the new charter, to adhere still to the company, and assist by their votes in subjecting the company perhaps to very great responsibility, and then afterwards to withdraw, and demand back the money which they had paid after the new act was passed, and with a full knowledge of its provisions.

It is true that the statute does not in words draw any line between those who paid their money before the act was passed, and those who might conform to the new charter and pay the money afterwards; but the clause only authorises the original stockholders to apply within three months from the passing of the act for the repayment of any instalment paid in cash by them or any of them. To make the act sensible, we must suppose the word "*paid*" to refer to payments that had been made before the act was passed, and not any which should be paid within three months after the act passing. It is quite susceptible of that construction; and any one contending for the contrary construction, we think, affords as clear a ground as is possible for the application of the maxim, "*qui hæret in literâ hæret in cortice.*"

Judgment for defendants.

ANDERSON ET AL. V. THE GREAT WESTERN RAILROAD CO.

Obstruction of water-course by G. W. R.—Justification—Pleading.

CASE for penning back the water of a stream supplying the plaintiffs' mills, by placing a hatch or gate across the same. *Plea*—That the defendants were incorporated by acts of Parliament for the purpose of constructing a railroad, and were thereby empowered to intersect or cross any stream on the route of the said railroad, and to construct the said railroad across or upon the same: that the said stream was on the route of the said railroad, and it was necessary that the said railroad should be constructed across the same; whereupon the defendants, in accordance with the powers and provisions of the said acts, *placed the said hatch or gate* in and across the said stream, and continued the same there—the said portion of the road not being completed at the commencement of this suit, so as to enable the defendants to restore the said stream to its natural state.

Held, on demurrer, plea bad, as not confessing and avoiding, or traversing the injury complained of; and for not showing a sufficient justification.

CASE.—The declaration stated that the plaintiffs were possessed of certain flouring and oatmeal mills, and enjoyed the benefit and advantage of a certain stream which flowed into the said mills for working the same; and the defendants were then making a railroad near to the said mills; yet the defendants, intending to injure the plaintiffs, heretofore, to wit, on, &c., wrongfully and injuriously caused to be placed a certain hatch or gate in and across part of the said stream, above the plaintiffs' mills, and thereby penned back the water of the said stream from the said mills of the plaintiffs,

so that the said mills could not be supplied with water, and the plaintiffs were prevented from working the same, and the said mills were much injured, and deteriorated in value.

Fourth plea—That long before the committing of the said alleged grievances the defendants were incorporated as a company for the purpose of constructing a certain railroad, by 4 Wm. IV., ch. 29, and 7 Wm. IV., ch. 62, and were thereby empowered and authorized, wherever it was necessary so to do for the construction of the said railroad, to intersect or cross any stream of water or water-course on the route of the said railroad, and to construct the said railroad across or upon the same; that the said stream was on the route of the said railroad, and it was necessary for the defendants in the construction of the said railroad to intersect and cross the same, or to construct the said railroad thereon; whereupon the defendants, afterwards, to wit, &c., *placed the said hatch or gate in and across the said stream*, and kept and continued the same there, in accordance with the powers and provisions of the said acts, and for the purpose aforesaid—the said part or portion of the said railroad not being complete, nor the construction thereof finished, at the time of the commencement of this suit, so as to enable the defendants to restore the said stream to the same state as before the obstruction thereof by the said defendants, or to a sufficient state not to impair the usefulness of the said stream—Verification.

Demurrer—The causes assigned sufficiently appear in the judgment.

Freeman, for the demurrer, cited 4 Wm. IV., ch. 29, and 7 Wm. IV., ch. 62; *Dimes v. Petley*, 15 Q. B. 276; *French v. Campbell*, 2 H. Bl. 178; *Beaver v. Reed*, 9 U. C. R. 152.

Cameron, Q. C., contra.

ROBINSON, C. J., delivered the judgment of the court.

The fourth plea is insufficient, in our opinion, in not confessing and avoiding or traversing the injury complained of, which is the penning back and diverting the water, and not merely the placing the hatch across the stream.

Then, we cannot say that the statute 4 Wm. IV., ch. 29, sec. 9, gives authority to the company to stop or divert at their pleasure, and without necessity, and as long as they please, the flow of any stream of water over which they have occasion to construct their railway. If it was necessary to do so in this instance for a time, while they were constructing their road, they should have set forth the necessity and admitted that they did stop or divert the stream, and should have averred that they were proceeding with all reasonable diligence in the completion of the road, so as to shew that they were continuing the obstruction no longer than was necessary. It was indispensable, also, that they should have averred that they gave that notice to the plaintiff of their intention to interfere with the flow of water to his mill which the statute requires.

Judgment for the plaintiff.

MELVILLE ET AL. V. CARPENTER.

Building contract—Extra work.

The defendant employed the plaintiffs to construct a house under a building contract, in which it was stipulated that there should be no charge for extra work unless specially ordered in writing by the architect employed. The defendant himself having requested the plaintiffs to do certain work on the building, and desired the plaintiffs' men to take their orders from him, and not from the architect;

Held, that for this work the plaintiffs might recover in an action on the common counts, without reference to the contract.

DEBT on common counts, for work and labor, and on account stated.

Pleas—nunquam indebitatus, payment, and set-off.

At the trial at Hamilton, before Burns, J., it appeared that the plaintiffs' claim was for work done to a house of the defendant. There was a building contract under which the house was erected. It contained the usual stipulations that there should be no charge for extra work unless specially ordered in writing by the architect employed. The work charged for was not work for which any written order had been given, but it was proved that the defendant himself had verbally directed the plaintiffs to do it, and had directed the plaintiffs' workmen to take their orders from him, and not from the architect.

The architect had afterwards estimated the work at a sum considerably less than the plaintiffs' claim. The learned judge held that the plaintiffs were entitled to go to the jury for the real value of the work, on this evidence. They adopted the plaintiffs' account, or rather that of his witnesses, as to the value, and found a verdict in their favor for £179 2s. 2d.

Eccles moved for a new trial, on the law and evidence.

ROBINSON, C. J., delivered the judgment of the court.

We think the case went fairly to the jury—that it was open to the plaintiffs under the facts proved to sue for extra work not required in writing to be done by the architect, and so not recoverable by means of an action on the contract; the fact being that such work was done upon the express request and direction of the defendant in person, who, according to the evidence desired the plaintiffs' men to do the work without any regard to what the architect might tell them. The condition referred to, that the architect shall certify, was inserted for the protection of the defendant himself, who might waive if he pleased by interfering personally and giving directions.

The price of some things may be rather high, possibly, but all went to the jury for their consideration, and the charges were supported by sufficient evidence. The abatement of £33 from the contract price of the house, which the defendant may be entitled to claim in respect to alterations which diminished the expense, or work incomplete, remains to be settled with reference to the contract and all that has been done under it, which is still open between the parties, and not affected by the verdict for extra work done upon the request of the defendant.

Rule refused.

MELVILLE ET AL. V. CARPENTER.

Building agreement—Covenant—Pleading.

In covenant on a building agreement the declaration stated that the plaintiffs agreed to do all the necessary carpenter's and joiner's work about the building to be erected on defendant's property, according to the specifications annexed to the agreement, and a plan made by A. M., which was incorporated with and formed part of the agreement; and to perform the same to the satisfaction of and under the superintendence of the said A. M., and the defendant, in consideration of the premises, agreed to pay the plaintiffs £490, as follows—that is to say, to convey certain lots to plaintiffs, on the completion of the work, at the rate of £2 per foot frontage; and the balance to be paid, two-thirds as the work progressed, in proportion to the work done, on receiving A. M.'s certificate to that effect, and the remaining one-third on the completion of the work. Performance by the plaintiffs of the covenants on their part was then averred, and that the defendant accepted the work as completed; and the breach assigned was, that although the defendant in part performance of his covenant, paid to the plaintiffs £449 8s. 10½d., yet he had not paid the residue of the £490, or any part thereof.

Held on demurrer, that it was unnecessary to set out the specifications in the declaration; but that the approbation of the architect should have been averred, or the omission of it sufficiently excused; and that the breach stated was insufficient, in making no mention of the agreement to convey.

COVENANT on a building agreement. *Declaration*: for that whereas, by certain articles of agreement made on the 11th of June, 1851, between the defendant of the first part, the plaintiffs of the second part, and one John White of the third part, reciting that whereas the said plaintiffs, for the considerations hereinafter mentioned, did covenant and agree to and with the said defendant that they would, at their own proper costs and charges, on or before the 15th July, 1852, in a good and workmanlike manner, and according to the best of their art and skill, and perform and completely finish all the carpenter's and joiner's work necessary to be done in and about the building about to be erected on the property of the defendant, according to the specifications thereunto annexed, and a plan thereof made by Albert A. Mills, which was incorporated with, and made part of the said articles of agreement; and roof and enclose the same, on or before the 1st of December then next ensuing; and would, subject to the agreement thereafter referred to, find all the necessary timber, hardware, and other good and sufficient materials requisite for the same; and would perform the said work to the satisfaction, and under the superintendence, of the said A. A. M.—the defendant, in consideration of the premises, did covenant and agree to pay the plaintiffs for the said work the sum of £490, as follows—that

is to say, he did covenant to convey unto the plaintiffs, their heirs or assigns, on the completion of said work, lots 24 and 25 on the corner of Hughson and Wood streets, having a frontage of about ninety-six feet on Hughson street; and which were to be taken at the rate of £2 per foot frontage; and the balance remaining due above the balance of said land to be paid, two thirds thereof in payments from time to time as the said work progressed, proportioned to the work done, upon receiving the certificate of the said A.A.M. to that effect, and the remaining one-third on the completion of the work; and the plaintiffs in fact say, that, although they were ready and willing, and offered to complete the said work according to the terms in the said articles of agreement specified at the time in that behalf mentioned, yet the defendant then prevented and discharged them from so doing, and afterwards, to wit, on the 1st October, 1852, the plaintiffs did complete the same, and the defendant accepted and received the same as finished and completed; and although the plaintiffs have, except whenever the defendant did prevent and discharge them therefrom, well and faithfully kept and performed all and singular the covenants and agreements in the said articles of agreement above specified, on the part of the said plaintiffs to be performed and kept; and although the said defendant, on the 10th of October in the year last aforesaid, did, in part performance of his said covenant, pay and furnish to the plaintiffs the sum of £449 8s. 10½d., which was accepted by the plaintiffs in satisfaction of that amount, and although the time for the payment of the residue of the said sum of £490, to-wit, £50 11s. 1½d. has long since, and before the commencement of this suit, elapsed; yet the defendant hath not paid the said sum of £50 11s. 1½d. or any part thereof.

Demurrer, assigning a variety of causes, of which those that are material are noticed in the judgment.

Eccles for the demurrer.

Springer, contra, cited Ladd v. Bullen, 10 U. C. R. 297; Franklin v. Miller, 4 A. & E. 599; The Duke of St. Albans v. Shore, 1 H. Bl. 273; 1 Saund. 320, note *d*; Laird v. Pim, 7 M. & W. 474; Stavers v. Curling, 3 Bing. N. C. 355; The Fishmongers Co. v. Robertson, 5 M. & G. 131; Harrison

v. Douglas, 3 A. & E. 396; *Cotteril v. Cuff*, 4 Taunt. 286—*Cort v. The Ambergate, Nottingham, &c., R. R. Co.* 15 Jur. 877.

ROBINSON, C. J., delivered the judgment of the court.

We think some of the exceptions urged against this declaration are well founded. It ought to have averred that the work was completed to the satisfaction of Hill, the architect, or shewn some sufficient reason for dispensing with that condition in the agreement. The mere fact of the defendant accepting the building is not sufficient, unless it were shewn unequivocally that, dispensing with the necessity of obtaining the architect's approbation, he accepted the building as completed according to the agreement.

It should have been shewn also, whether the defendant had or had not conveyed the land which was to be taken in part payment—if not, the defendant should have been charged with a breach of his agreement in not making the conveyance. If the land was conveyed, then the plaintiffs should have averred how much the value of the lots amounted to at £2 per foot frontage, and the breach complained of should have been stated to be the not paying the residue in money.

We do not think there was any necessity, as the defendant contends, for setting out all the specifications in the declaration—that would be a very tiresome and useless prolixity.

Judgment for defendant on demurrer.

MELVILLE ET AL. V. CARPENTER.

Assumpsit—Pleading.

In assumpsit for work and labour, it is sufficient to plead that after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, the plaintiffs and defendant accounted together of and concerning the causes of action in the declaration mentioned, and of and concerning certain other demands of the plaintiffs against the defendant, and of and concerning certain other demands of the defendant against the plaintiffs; and that upon that accounting a sum of £50, and no more, was found to be due from defendant to plaintiffs, which he, the defendant, then promised to pay to the plaintiffs, and which he hath always been willing, and still is willing to pay.

ASSUMPSIT. First count, for work and labour, and materials. Second count, on an account stated—Breach, nonpayment. Damages, £200.

Plea—To the first count, that after the accruing of the causes of action in that count mentioned, and before the

commencement of the suit, to wit, on, &c., the plaintiffs and the defendant accounted together of and concerning the causes of action in that count mentioned, and of and concerning certain other demands of the plaintiffs against the defendant, and of and concerning certain other demands of the said defendant against the said plaintiffs; and upon that accounting the sum of £50, and no more, was found to be due from the defendant to the plaintiffs, which he, the defendant, then promised to pay to the plaintiffs, and which he hath always been willing, and still is willing to pay—Verification.

Demurrer—Because the said plea sets up an accounting between the plaintiffs and defendant, after the accruing of the causes of action referred to, in the nature of an executory accord or agreement, without shewing any satisfaction, or that the said agreement was to be accepted as satisfaction; and because the new promise in the said plea mentioned, made on the said subsequent accounting, is only the substitution of a chose in action of the same nature as the cause of action to which it is pleaded, and is no defence thereto.

Springer, for the demurrer, cited Hall v. Flockton, 20 L. J. (Q. B.) 208, 4 Eng. R. 185; Thomas v. Mallory, 6 U. C. R. 521; Finl. L. C., 29.

Eccles, contra, cited Smith et al. v. Page, 15 M. & W. 583.

ROBINSON, C. J., delivered the judgment of the court.

This plea seems to be good, according to the judgment of the court in Smith et al. v. Page, relied on by Mr. Eccles, and it seems reasonable that it should be so held, for, otherwise, after parties who had had mutual dealings had settled their accounts and struck a balance, which the party found indebted acquiesced in and promised to pay, the whole account on both sides might be thrown open, and perhaps after mutual abatements and concessions had been made, and receipts or other evidences of debt given up or destroyed. This plea sets up an accounting together concerning the cross demands of each party, and seems to comply with what was held in the case already cited to be necessary for making such a plea as this a good bar to a suit on the first cause of action, without averring more than is averred here.

Judgment for defendant on demurrer.

SUMMERS V. GEARY.

Contract—Sub-contractor—Pleading.

Declaration in assumpsit. The second count stated that section 59 was laid out on a certain portion of the O. S. & H. R. R., and the defendant had contracted with Messrs. S. & Co., the contractors with the company for making the said road; and in consideration that the plaintiff would do certain work on said section at the prices and rates in the first count mentioned, the defendant promised the plaintiff that he should, in a reasonable time after making his contract, have possession of the said section to enable him to go on with his work: that the plaintiff commenced the work and did a large portion thereof, and frequently requested the defendant to put him in possession of the remaining portion of said section to enable him to complete his contract—The breach assigned was that it was not in the power of the defendant to give the plaintiff possession when so requested, and that the said R. R. Co. changed and altered the line of road, so that the said section was located at a place and on a line different from that on which it had theretofore been.

Held, on demurrer, declaration bad; for it appeared that the change of line had been made by the company, and the plaintiff's agreement with defendant was subject to the conditions of defendant's original contract.

ASSUMPSIT on an agreement, by which the plaintiff undertook to do certain work for the defendant, on section 59 of the Ontario, Simcoe, and Huron railroad.

In the first count, the prices agreed upon and the terms of payment were set out; and the breach averred was the non-payment for work performed in accordance with the agreement.

The second count stated that section fifty nine was laid out on the said railroad, and the defendant had contracted with Messrs. Story & Co., the contractors with the company for making the said road; and in consideration that the plaintiff would do certain work on said section, at the prices and rates in the first count mentioned, the defendant promised the plaintiff that he should, in a reasonable time after making such contract, have possession of said section, to enable him to go on with his said work, and that he, the defendant, would not hinder or prevent the plaintiff from going on with the same: that the plaintiff commenced his work, and did a large portion thereof, and was at all times, until prevented, ready and willing to go on with and complete his contract, and was at all times desirous of getting possession of the remaining portion of the section for that purpose, and frequently requested the plaintiff to allow him to have possession of the same; yet, the plaintiff averred, *that it was not in the power of the defendant to give the*

plaintiff possession when he the defendant was so requested; and the defendant hindered and prevented the plaintiff from getting possession of the same, and neglected and refused to let him have possession; and in fact the plaintiff saith that the said railroad company changed and altered the said line of road, so that the said section was located at a place and on a line quite different from that on which it had theretofore been. Averment of damage by loss of profits, and by engagements entered into with others, for breaking which the plaintiff was obliged to make compensation, &c.

Demurrer—For that the plaintiff, in and by the said second count, complains of a breach of the contract therein set forth, in respect of which he hath himself alleged that the defendant had no power: that the breach assigned is insufficient in this, to wit, that, for anything that appears therein, the plaintiff may have carried on and completed his contract, and received payment therefor, upon the said section therein mentioned, notwithstanding the alteration: that as the defendant, in and by the said count, is shewn to have been himself a contractor for the performance of the said work, and the plaintiff a sub-contractor, and the said contract to have been made subject to the terms of the defendant's employers, the plaintiff hath himself shewn a good answer to the breach by the allegation that the breach was caused by the said railroad company.

Eccles for the demurrer.

Read, contra, cited *Hawcroft v. The Great Northern Railway Company*, 8 Eng. R. 362; *Touteng v. Hubbard*, 3 B. & P. 296; *Tuffnell v. Constable*, 7 A. & E. 798; *Lloyd v. Crispe*, 5 Taunt, 249; *Cort v. The Ambergate, &c., Railway Company*, 6 Eng. R. 230.

ROBINSON, C. J., delivered the judgment of the court.

The jury have only given a shilling damages upon the count which is demurred to, so that there is nothing at stake but the costs, upon considering the count, we do not think it sustainable. The work which the plaintiff contracted to do for the defendant was to be paid for, not by the job, upon an estimate of what the section might be

worth, but by the number of cubic yards of excavation according to the charges, being regulated according to the description of materials to be excavated, whether stone, gravel, or earth. It was therefore unreasonable in the plaintiff to make a difficulty on account of the line being shifted to the right or left, since he would still be paid for the work that he might have to do according to the scale of charges agreed upon. Besides bringing this action, however, for payment for the work that was done by him before any change had been made in the line, he has made the further demand contained in this count, for not being permitted to go on with the old line after it had been abandoned by the company for the new line, which they had adopted in its stead. This defendant, who employed him, was bound to follow the directions of the engineer, and go on with the section as it was altered, not as it was first laid down; and it is obvious from what the plaintiff sets out in his declaration, that he, as sub-contractor, must very well have known that the company were not bound to pay for making two lines where they only wanted one. He must have known that he, as sub-contractor, was bound by the conditions in this respect of the original contract, unless the defendant had chosen, which is not very likely, to undertake expressly that he would employ the plaintiff to go on and finish the line as first laid out, and pay him for it out of his own pocket, whether the company sanctioned it or not. He shews that the company changed the line, and for all we see it may have been changed but a few feet on one side or the other. After the change it would still form the 59th section; it would be to the section as so modified that his agreement would apply, and he does not charge the defendant with refusing to allow him to complete the section as it was at last laid out. The agreement plainly provides that the defendant, as the contractor with the company, was to be subject to the order of the engineer as to any such changes; and the plaintiff's agreement with the defendant only bound the defendant to pay him out of the moneys which he should receive from the company. The company would of course not pay him for obstinately going on and completing the abandoned line, and it is strange the plaintiff could have

imagined that the defendant could under such circumstances be compelled to pay him.

It is probable that the defendant could have defended himself more easily against this unreasonable demand, by merely denying that he contracted in the manner that the plaintiff says he did ; for it is not likely that the defendant was so heedless as to enter into a stipulation that he would allow the plaintiff to go on and finish the line as first laid out, even if the company should abandon it. I dare say no agreement could have been produced that could have fairly borne such a construction.

However, upon the demurrer, we think the defendant entitled to judgment.

Judgment for defendant on demurrer.

TRINITY TERM, 17 VICTORIA.

Present—The Hon. JOHN BEVERLEY ROBINSON, C. J.

“ “ WILLIAM HENRY DRAPER, J.

“ “ ROBERT EASTON BURNS, J.

WHITE V. CLARK (a), AND PARSILL V. CLARK.

Notice of action—14 & 15 Vic ch. 54, not retrospective.

Where an action was commenced after the passing of 14 and 15 Vic. ch. 54, for a trespass committed before, against an officer protected by this act, but not previously—*Held*, that the statute would not apply, and that the defendant was therefore not entitled to notice of action—*Draper, J.*, dissenting.

In each of these cases the plaintiff complained of trespass for seizing lumber, &c.

The defendant in each pleaded—1. not guilty “by statute.” 2. That the goods were not the plaintiff’s. 3. Leave and license.

(a) See Vol. x, 490.

At the trial at Goderich, before Burns, J., it was proved that the lumber had been cut without authority upon the lands of the Crown, in a township not surveyed. It was seized by direction of the defendant, who was the Crown Lands agent, under the statute 12 Vic. ch. 30, as having been unlawfully cut.

It was objected that a month's notice of action was necessary under our statute 14 & 15 Vic. ch. 54, although the lumber was seized before the passing of that act.

The statute was passed on the 30th of August 1851, and the lumber was seized in the spring of that year. This action was brought on the 30th of July, 1852.

The question was whether the statute 14 & 15 Vic. ch. 54, sec. 2, could be applied in such a case retrospectively.

A verdict was found for the plaintiff in each case, leave being reserved to the defendant to enter a non-suit.

Richards in each case moved for a non-suit accordingly, or for a new trial on the law and evidence, and for misdirection.

Cameron, Q. C., shewed cause.

The arguments of counsel, the authorities cited, and the provisions of the statute referred to, are noticed in the judgments of the court.

ROBINSON, C. J.—I apprehend the effect of the several provisions of this act must in some measure have escaped attention while the Legislature was passing it—I mean its effect upon any of those persons who, under the existing law, had certain privileges in making their defence, under statutes which by this act are totally repealed, except as to actions pending. If this defendant had been entitled to notice of action, and to have the action limited in point of time under any existing statute, then this statute would have deprived him of any such protection, unless the action were pending when the act was passed, which we see it was not. Where the Legislature have so expressly inserted a certain saving as to the effect of their repealing act, we cannot alter the statute by extending that exception further than the language warrants. As to such cases, then, the parties on both sides

would be left without any statutory provision of this kind unless it be right to give a retrospective effect to the provisions in the new statute. It is not a matter of necessity that we should do so, if it would appear to be unwarrantably straining the statute; because the consequence of forbearing to do so would be no worse than this, that the parties would be left to sue and be sued as in other cases of trespass at common law. But the present case seems to me to be one in which the officer sued had no privilege in making his defence under any former law. The statute 12 Vic. ch. 30, which imposed the duty upon him of seizing Crown timber unlawfully cut, contains no protecting clause for his benefit in case of his being sued. He therefore was not prejudiced by the repeal of the former protecting statutes before this action had been brought; for he had no protection before. The new statute, 14 & 15 Vic. ch. 54, first gives it to him, if indeed it be quite clear that it does extend to him, and I think we must hold that it does, considering the very extensive language of the second clause, though certainly the preamble does not indicate any intention to let in for the first time so very numerous a class of persons. The point which we have now to determine—namely, whether the last act confers the privilege retrospectively—was before us in this same case last Hilary term, but not disposed of, because it was discovered that the plea was not marked “by statute” on the record. I did, however, state what was my impression at the time as to the propriety of giving to the statute a retrospective operation, so as to subject plaintiffs to its provisions in respect to actions brought after that statute but for alleged trespasses committed before it was passed and by persons who, under the former law, could have claimed no privilege or protection of the kind in making their defence.

Upon further consideration, I remain of the opinion expressed by me in *White v. Clark*, as reported in our tenth volume of Reports, page 490. I think the statute cannot properly be applied to such cases. We must take the second and eighth clauses together while we are considering that point.

We cannot hold that the act applies retrospectively as

regards notice of action, and yet not retrospectively as regards the limitation of time for suing; for the language is the same in both clauses. Where, therefore, a wrong had been committed by a public officer six months before the act was passed, but no action had been yet brought,—if the plaintiff were held to the necessity in such a case of giving a month's notice of action, and indeed even without that, when the six months had actually elapsed—the plaintiff might be cut off from all remedy for an injury that might have been most wanton and ruinous in its character and consequences, because he had not conformed to provisions which were not in force while the time was running out; and which the Legislature had never thought of exacting till it was too late to comply with them.

This is precisely a case, I think for the right application of the maxim of Lord Coke in his Second Institute, page 292, in his commentary on the statute of Gloucester, "*Nova constitutio futuris formam imponere debet, non præteritis*"—a maxim cited with approbation in many cases, and very recently in *Moon v. Durden* (2 Ex. 22.) The case of *Marsh v. Higgins* (19 L. J. C. P. 297) is a very strong authority against giving this statute a retrospective effect. By comparing the circumstances of that case and of the one now before us with the facts of the case of *Jones qui tam v. Ketchum* (a), in which we gave judgment this term, the reasons will be evident in favour of the different conclusions to which the several cases point.

I think the rules for nonsuit in these cases of *White v. Clark* and *Parsills v. Clark* should be discharged.

DRAPER, J.—There are two classes of persons affected by this act, 14 & 15 Vic. ch. 54; namely, first, those who had protection before the act, and whose previous protection is taken away by the repealing section, and a new protection substituted; and, secondly, those who had no protection before, but have it conferred upon them by the statute. The defendant certainly comes within this class.

It is to be considered whether, except in one respect,—

(a) Ante page, 52.

namely, in relation to actions commenced or prosecuted before the passing of the act—the Legislature have made any difference between these two classes ; for, if not, then unless the act be retrospective, justices and others previously protected, but against whom no suits had been instituted, are deprived by the repealing clauses of that protection, and as to causes of action existing before the statute was passed may be sued just as any other person ; or, if the act has a retrospective operation as to justices &c., then this defendant will be entitled to its protection in this suit instituted more than a year after it was passed.

There are also two classes of decisions necessary to be considered in determining the proper construction of this act—First, those which relate to the operation and effect of a repealing statute, as to the previous law, and to existing rights or liabilities under it ; and, secondly those which are more strictly confined to the consideration of the question, whether a new enactment has a retrospective operation or not.

On examining the statute 14 & 15 Vic. ch. 54, we find a repealing part, and a new enacting part. The first section repealing so much of every act as conferred any privilege as to notice, limitation of action, amount of costs, pleading the general issue and giving special matter in evidence, the venue, tender of amends, or payment of money into court, upon any justice of the peace public officer, or such person, by virtue of his office, under the provisions of any such act ; *except* as to any action suit or proceeding, which has been commenced or prosecuted before the passing of this act.

The effect of this repeal, severed from the residue of the statutes and construed as if standing alone, is clearly stated in *Surtees v. Ellison*, (9 B. & C. 752,) by Lord Tenterden :—“ It has been long established, that, when an act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed. That is the general rule ; and we must not destroy that by indulging in conjectures as to the intention of the Legislature ;” and again by Chief Justice Tindal, in *Kay v. Goodwin* (6 Bing 582) :—“ I take the effect of repealing a statute to be, to obliterate it

as completely from the records of parliament as if it had never passed ; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted, and concluded while it was an existing law." But for the exception in the first clause, therefore, actions brought before the passing of the statute might have been maintained afterwards without shewing that the provisions of the repealed act had been complied with, and though, according to those provisions they would not have been maintainable ; and as a necessary consequence, causes of action accruing before the statute was passed stood clear of those privileges which the repealed act had conferred on defendants.

But, however absolute the repeal of the former provisions, the question still remains, whether the protection which the second and subsequent clauses of the act give is limited to causes of action accruing after the passing of the statute ; or whether it extends to such as accrued before. The first thing to look at is the preamble ; for by 12 Vic. ch. 10, sec. 4, subsec. 28, "the preamble of every act shall be deemed a part thereof, intended to assist in explaining the purport and object of the act." This is as follows : Whereas there are divers acts of Parliament in force in Canada, both public, local, and personal, whereby certain protections and privileges are afforded to magistrates and others ; and whereas the said acts are not of a uniform character, and it is desirable that many of the provisions of such acts should be altered and amended and the whole reduced into one act." This language plainly indicates an intention, that all persons who, under former acts, had protection, should continue to enjoy it, though possibly in some modified form ; though I rather apprehend that in nearly every case the protection will be greater rather than less than it was before, except as to double or treble costs, which in *Charrington v. Meatheringham* (2 M. & W. 227) are treated rather as a penalty than a protection and except some few cases in which the right to bring the action was limited to three months instead of to six, which is the uniform period fixed by this act. Reading this preamble, with the repealing clause which it serves to introduce, though we may see clearly an intent

to abrogate all existing enactments on the subject, we see with equal clearness an intention to substitute other provisions for the same object.

Regarding then, in the first place, only those parties who were privileged under the repealed acts, it will be impossible to deny that if they are deprived of all protection for acts done before the passing of the act, it must have arisen from oversight. It seems to me absurd to suppose that by the self-same clause in which all pre-existing privileges and protections are carefully saved as to any action, suit, or proceeding commenced, the Legislature intended to leave such parties wholly unprotected as to causes of action for or upon which no action, suit, or proceeding had been commenced.

We are then driven to enquire whether the language used in conferring the new privileges or protection, either by its own force and obvious meaning, or by the rules of construction established by the authority of reported cases, compels us to hold that the Legislature have omitted to carry the intention indicated by the preamble and repealing clause into effect, and have instead thereof produced, as to matters which happened before the statute was passed, a precisely opposite result.

So far as such parties are concerned, the maxim, "*Nova constitutio futuris formam imponere debet, et non præteritis*," can hardly be invoked for their prejudice; for the privilege contained in the present statute cannot fairly be treated as *Nova constitutio*; it is the making uniform and amalgamating that which had been long before constituted.

Then in considering the language of the statute, the second section is the only one to which any close attention need be given. The seventh is a benefit to plaintiffs; and the eighth, which restricts actions to six months from the act committed in the great majority of cases is only a re-enactment of the former law, and in most, if not in all others, will give more, rather than less time to plaintiffs to institute suits.

Coming then to the second section, it enacts that "no writ shall be sued out against any justice of the peace, or other officer or person fulfilling any public duty, for *anything by him done* in the performance of such public duty,"—however

the same arises—nor shall any judgment or verdict be rendered against him unless notice in writing of such intended writ, specifying the cause of action with reasonable clearness, shall have been delivered to such justice," &c., "at least one calendar month before suing out such writ," &c.

The only question that can be raised is on the meaning of the words, "anything by him done in the performance," &c. In my opinion the word "done" is not used as in any sense denoting or referring to the *time* of the act committed; *i. e.*, it is not used in signifying anything actually past, and in that sense done at the time the Legislature are speaking, nor as to anything *future* or *to be done* after the statute was passed. The first of these senses would be obviously contrary to the intention of the Legislature, for it would leave all future acts without protection; and the second, in my humble judgment, is narrowing the effect of the enactment unnecessarily, and contrary to the intention (which, I think is sufficiently shewn) to substitute the protection given by this statute for that previously existing, but not to leave unprotected any one who had privilege under the repealed acts.

The Statute 24 Geo. II. ch. 44. sec. 1 enacts, "that from and after the 24th June, 1751, no writ shall be sued out against, nor any copy of any process, at the suit of a subject, shall be served on any justice of the peace for *anything by him done* in the execution of his office, until notice in writing," &c. It will not, I think, be denied, that the words, "*anything by him done*," in this statute, have precisely the meaning I place on them when used in the 14 & 15 Vic., ch. 54—that is, anything done at any time. The fixing a particular subsequent day in the statute after which it is to take effect, puts that beyond dispute as the decisions upon Lord Tenterden's act in relation to the Statute of Limitations establish (*a*). It certainly appears to me that the preamble, the exception in the repealing section, and the intention thus indicated, should have equal weight in inducing a similar construction of precisely similar words, used in a statute passed with a similar intent.

(a) See *Fowler v. Chatterton*, 6 Bing. 258.

I cannot say that I feel pressed with the cases of *Hitchcock v. Way* (6 A. & E. 948), or of *Paddon v. Bartlett* (3 A. & E. 874). In both these cases the actions were commenced before the passing of the statutes respectively affecting the subject matter of the suits ; and the general rule laid down in the former case—that the law as it existed when the action was commenced must decide the rights of the parties, unless the Legislature by the language used shew a clear intention to vary the mutual relations of such parties—is not I think opposed to the conclusion I have suggested.

The case of *Moon v. Durden* (2 Ex. 22) is a stronger authority in favour of the plaintiffs, though in that case also the action was brought *before* the statute which was under consideration had been passed. The court were not unanimous even under that circumstance, and Platt, B., held the statute retrospective while Alderson, R., attaches, apparently, some weight to the distinction between a suit brought before and one brought after the passing of the statute. Rolfe, B., however, expresses an opinion generally that the statute did not effect rights already acquired ; and Parke, B., apparently goes to the same extent, though his judgment commences by stating that “the only question in this case, is, whether the act (8 & 9 Vic. ch. sec 109, sec. 18) affects *existing suits* for the recovery of wages or not ;” and he adds, “I have felt a good deal of difficulty in deciding upon the true construction of this statute.” Taking this case, however, as going the full length of deciding that the statute there considered had a retrospective operation, I am not satisfied it governs this case. The strong ground of the opinion against a retrospective construction is its interference with rights existing by law,—“the apparent injustice of putting an end to a vested right.”

If this be the foundation of the opinion of Parke and Rolfe, B B., concurred in probably by Alderson, B., also—then, still limiting my remarks to the cases of those protected under former acts, it is a decision the principle of which favours a retrospective construction for a contrary decision will deprive justices, &c., of an immunity they had at all events up to the passing of the statute, and to which they

had a legal and vested right when they committed the act which is the foundation of the suit against them ; and such a construction, taken in connection with the exception in the first clause, will reverse the maxim of “ *vigilantibus non dormientibus*,” &c. ; for the plaintiff who brought his suit before the statute was passed will have to prove notice, &c., while he who has delayed till after, will have no such imdediment to the prosecution of his suit.

Marsh v. Higgins (19 L. J. C. P. 297) decides against giving a retrospective effect to a statute so far as to deprive a creditor of his *right to an action commenced* by him before the act came into operation.

Pinhorn v. Sonster (16 Jur. 1001) is hardly an authority on the question in discussion, except so far as it affirms the general rule of construction—“ *Nova constitutio*,” &c. ; a rule which, nevertheless, even in Moon v. Durden, the court clearly admit will yield to a sufficiently expressed intention of the Legislature that the enactment should have a retrospective operation—an illustration and application of which qualification is to be found in Regina v. Leeds and Bradford R. R. Co. (16 Jur. 817.)

The result in my mind is, that, as to justices of the peace and all others who had privileges in actions brought against them for any act of theirs, or anything by them done, (I treat the two phrases-as identical in meaning) the execution of their office, the statute is retrospective.

But the defendant does not come within this category. He is one of the “public officers” clearly coming within the protection of this act, but who had no such protection before ; and I am free to confess, that, if this statute had been confined to the extension of the protection enjoyed by justices of the peace, &c., without the appeal and the re-enactment applicable to justices of the peace, &c., I should have felt it impossible, in the face of the authorities, to hold that it was retrospective. I think it is, however, impossible to sever the enactment, or to engraft upon it a distinction which will make it prospective as to the defendant and others similarly circumstanced, and retrospective as to justices of the peace, &c. : and we must decide whether the blending

together into one class those who had previous protection and those who had none, is to be treated as making the statute prospective or retrospective as to all.

And as to this, after the best consideration I can give the subject, and with much deference to the opinions of those who differ from me, I have arrived at the conclusion that the statute does operate retrospectively. I have endeavoured to give every just weight to the argument deducible from the apparent injustice of depriving a party of a vested right of action, which in this case would be the effect of the construction, though the statute when passed would not have had that operation on all pre-existing causes of action but only on such like the present, with regard to which a month's notice could not have been given, and the action have been brought within six months after the act committed. To this extent I am fully sensible parties will, upon my construction, be deprived of vested rights. Against this I have set the injustice of depriving parties of protection for acts done possibly in reliance on that protection, and of leaving such parties liable to suits for acts which the repealed statutes would have effectually barred, together with the strong conviction which I derive from the preamble and the repealing section, that the intention of the Legislature is expressed with abundant clearness, not to take away, any further than is expressed in the following sections, any privilege theretofore enjoyed. In carrying out this intention, there was no interference with vested rights—no injustice to third parties in extending the same privilege to others to the extent above suggested there may have been. But, as I think the effect of the enactment as to the former class clear and self evident and as I think there is no safe ground for giving one effect to the statute as to one class of persons, and a different effect as to another, I do not, because of this injustice, feel at liberty to avoid the (to my mind) plain intention. "The Legislature," to use the words of Pollock, C. B., in a recent case, *Miller v. Salomons*, (16 Jur., 388,) "continues with ability and wisdom to correct its own errors, (if errors they be), to give effect to its own intentions, to enforce its own views; and I think where the meaning of a statute is plain

and clear we have nothing to do with its policy or impolicy, its justice or injustice, its being framed according to our views of right, or the contrary. If the meaning of the language used by the legislature be plain and clear, we have nothing to do but to obey it—to administer it as we find it; and I think to take a different course is to abandon the office of judge, and to assume the province of legislation.

In my opinion the rule for a new trial should be made absolute.

Besides the cases particularly mentioned, I refer to *Hilliard v. Lenard* (M. & M. 297), *Grant v. Kemp* (2 Cr. & M. 636), *Freeman v. Moyes* (1 A. & E. 338), *Regina v. the Inhabitants of Mawgan* (8 A. & E. 496), *Jacques v. Whitby* (1 H. Bl. 65), *Burn v. Carvalho* (1 A. & E. 896), *Regina v. The Inhabitants of Denton* (21 L. J. Mag. C. 207), *Merrick v. Wakley*, (16 Jur. 803).

BURNS, J.—The difficulty in construing the stat 14 & 15 Vic. ch. 54, undoubtedly arises from the circumstance of the second section embracing, with a class of persons who had certain protections afforded them, another class who had no protection previously given them. The defendant had no protection previous to this act; but I think the terms of the second clause are sufficiently comprehensive to include him as an officer or person fulfilling a public duty, and therefore entitled to the privileges and protection which the act affords to whatever extent that may be. The question at issue is, whether it shall be so construed as to have a retro-active operation applying to an act done before the statute was passed; or whether it is to be confined to things done after the act passed. The action being commenced after the passing of the act can make no difference in the construction because the words are, that no judgment or verdict shall be rendered unless notice of action be given; and therefore, if the action had been commenced before the statute was passed and was ready for trial—or had a trial been had, and the statute passed before the time for rendering judgment had arrived—if the clause is to have a retrospective operation, then the action must be stayed. This is one of the difficulties

pointed out by Parke, B., in *Moon v. Durden*. I adopt every word of what C. B. Pollock says, in *Miller v. Salomons*, and apply it to this case when he says "If the meaning of the language used by the legislature be plain and clear, we have nothing to do but to obey it; and, I think, to take a different course is to abandon the office of judge, and to assume the province of legislation."

The consideration of the question presents itself to my mind in two points of view. The first is, what effect it would have had to extend the provisions of the statutes then in force respecting magistrates and others entitled to protection to those having no protection; and, secondly, what effect it has joining the two classes together. In taking this view of the subject, the cases resolve themselves into two classes; the one, where the effect is intended to deprive persons of a privilege or right which previously was enjoyed or vested, and the other, where it is intended to confer a privilege or advantage. In the one case the statute is construed strictly, and in the other liberally and equitably. Here we have in the same statute and clause, equally applying to all, a combination of a strict application of a rule of construction with either a liberal and equitable one, or a construction forced into a liberal and equitable view to carry on a protection previously enjoyed.

With regard to the first, the rule in the construction of a statute is so to construe it in case of a vested right as to support and not defeat that right, unless the plain words of the legislature leave no other construction, than to destroy the right (α). The second section must be read in conjunction with the limitation clause, in order to expound the meaning and in this respect our act differs entirely in its effect as to the expression "*for anything by him done*" from the same expression in stat. 24 Geo. II., ch. 44. Although the imperial act limited the action to be brought within six months after the act committed, in the same manner that our act does, yet the effect of limiting a day after which, if a writ were sued out, the plaintiff must prove a month's notice before doing so,

(α) *Vide* *Edmonds v. Lawly*, 6 M. & W. 284; *Moore v. Phillips*, 7 M. & W. 536; *Unwin v. St. Quintin*, 11 M. & W. 277; *Moon v. Durden*, 2 Ex. 22; *Marsh v. Higgins*, 19 L. J. C. P. 297.

was that all actions commenced before that day might proceed without a notice served. The object, no doubt, was that no existing actions, or action commenced before that day, should be interfered with as regards notice; and the same principle occurred in the 9 Geo. IV., ch. 14, as to the limitation of actions. It was passed on the 9th of May, 1828, and was not to come into operation until the 1st of January, 1829. This act was for the purpose of declaring the kind of proof which would be necessary to support an action tried after the 1st of January, 1829, in order to avoid the consequence of delaying to sue till after the expiration of six years. The naming of such a distant day was to enable parties to bring pending actions to a conclusion before that day; or in the mean time if parties were willing to allow their demands to be still outstanding, they might place themselves in the position of having an acknowledgment in writing. The stat. 14 & 15 Vic, ch. 54, came into operation instantly it was passed; and this is a strong reason why it should not be construed to destroy rights then vested, without it be clear that the legislature intended to do so. There is nothing express in the act which has that effect, and the intention to do so must be gathered from the circumstance of joining justices and those previously protected with those who were for the first time protected by the act. This brings me to consider the second question—the effect of uniting the two classes in one enactment.

The second question may be looked at in two ways: first, to consider whether the statute should, as against justices, receive a liberal and equitable construction, on the ground that it could not be the intention of the legislature to deprive them, in cases where no action was pending at the time of the passing of the statute of all protection; and, secondly, whether the effect of the statute, whatever we may imagine the intention to have been, does not in effect deprive justices of all protection where no action had been brought. If we put the construction upon it, that, notwithstanding the exception contained in the first clause of pending actions, justices would still have the protection of a month's notice, then we should have a conflict of interest; that is, those who had

vested rights on the one hand, against those who had no previous protection, in opposition to the privileges and protection of persons to whom they had been previously afforded. In an equitable point of view, I can see no reason why those who had vested rights should be deprived of them from a supposed desire to protect the other class. The legislature had before them the class of persons who had a protection cast around them, and was dealing directly with the laws respecting them. It was thought fit to repeal all existing laws with certain exceptions. It appears to me as reasonable to suppose the legislature intended to remit one class of persons with whom they were dealing to their liabilities without protection of a notice of action, as to suppose it was intended to deprive another class of rights, the extent of which the legislature could at that time know nothing. If I am driven to rest my opinion upon this view of the case I should be inclined to say that the legislature must be intended rather to have meant that the cases of justices and those who previously had protection should give way, than that the other class should be deprived of their rights; for in the one case it would be but depriving one class of the power of tendering amends before suit, but in the other case it would be the deprivation of a legal vested right of action. The case before us illustrates that view; because, if the defendant had proved that the plaintiff had violated the terms of the statute 12 Vic., ch. 30, and that the defendant's acts were within its provisions then he would have been entitled to succeed without having had a notice of action; and if the 12 Vic., ch. 30, did not protect him, then he was in the position of not having had the power of tendering amends before action brought. Be this view correct or not, I have no doubt that the correct interpretation to give to the act as to justices and others liable to actions, but against whom no actions were pending when the statute was passed, is that they were deprived of the protection of a notice of action; and consequently no difficulty stands in the way of interpreting the act so as not to deprive parties of vested rights. I look upon the effect of the repeal of the previous acts to be as if they never existed, and now no longer exist, except in

cases of actions pending at the time of the passing the new act, as mentioned in the new act ; and that the act 14 & 15 Vic., ch. 54, is to be looked upon as the first act on the subject. Lord Tenterden in, *Surtees v. Ellison* (9 B. & C. 752), says the Bankrupt Law, 6 Geo. IV., ch. 16, is to be looked upon as if it were the first that had ever been passed on the subject of bankruptcy, and yet the preamble of that act recites that it is expedient to amend the laws relating to bankrupts, and to simplify the language thereof, and to consolidate the same so amended and simplified into one act. In many instances the clauses are merely re-enactments of previous statutes without a word of alteration, and in very many instances a slight addition merely is made (b).

The effect of so deciding may operate hardly, so as to subject some persons to the costs of a writ and declaration, for the defendant may still plead a tender of amends ; but, as Lord Tenterden says, in *The King v. The Inhabitants of Barham* (8 B. & C. 104.) "It is better to abide by this consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose to have been the intention of the legislature." In a case upon the construction of the game laws, *Jones v. Smart* (1 T. R. 44), Ashurst, J., speaking of the effect of a law which qualified the son, but did not name the father, says—"But, said the legislature, the heir apparent, who is in the line of succession, shall likewise be qualified from a supposition that the esquire was so already. According to which construction, I cannot think that it was their intention purposely to exclude the father, but in fact they have done it." The exception contained in the first clause of the act shews that the legislature was alive to the effect of repealing the previous statutes ; though it is singular that the previous statutes should have been kept alive in cases where actions had then been brought, and yet be repealed as to cases which then *might have been* brought ; but I see no other construction to give to the act, consistent with the principles of interpreting laws, than that such anomaly exists. If the second clause is to be consid-

(b) *Vide Regina v. The Inhabitants of Mawgan*, 8 A. & E. 406 ; *Regina v. The Inhabitants of Denton*, 21 L. J. (M. C.) 207.

ered as the first enactment on the subject of notice as regards justices, in all actions brought after the statute passed, then of course the defendant in this case who had no previous protection, cannot claim a privilege that he should have had notice of action.

For these reasons I think the verdict should, stand and the postea be delivered to the plaintiff.

Rule discharged.

COLTON V. GOOD.

Breach of contract—Damages recoverable.

Assumpsit on a contract to make and deliver two pairs of burr mill-stones. Breach, their insufficiency and bad quality. The jury, in addition to the cost of new stones, allowed certain separate sums for money expended in attempting to repair the broken stones—for dressing them—and for injury caused by their breaking to the machinery of the mill; damages being specially claimed in the declaration on these accounts.

Held, that the verdict was sustainable as to the last two items, but not as to the first.

ASSUMPSIT on a special contract for the making and delivery by defendant of two pairs of burr mill-stones, of good materials and workmanship. Breach the insufficient making of them: and averment of special damage. Common counts were added for goods sold and delivered, &c.

Pleas.—1. Non-assumpsit. 2. To the first count that the mill-stones (for the sufficiency whereof and the consequent damage the action was brought) were sound, strong, well-hooped, and manufactured.

The case was tried at Brockville, before Draper, J. The agreement was proved, and that two run of mill-stones were sent by defendant to the plaintiff in pursuance thereof, and were taken to the plaintiff's mill, at the White Fish Falls, in the township of South Crosby. They were put up in the mill, and at the first trial the upper stone of one pair burst all to pieces. This happened about the 23rd of December, 1851, when the navigation was closed. As the plaintiff could not get a new stone except by land and, not nearer than Toronto, he endeavoured to repair the broken one. The bands round the broken stone were sworn to be rusty and inefficient, and the plaintiff went to an expense of £2 10s. to put new bands on the other pair. The plaintiff had also dressed the pair of stones, the upper one of which broke preparatory to using it.

The machinery of the plaintiffs mill was damaged by the breaking of this stone. Many of the pieces flew out into the river, and the plaintiffs was put to some expense in collecting the scattered pieces, and in endeavouring to repair the stone. At last, failing in this, he purchased a new pair for his mill, and brought this action to recover damages sustained. Under the common counts the plaintiff also gave evidence of goods sold and delivered to the amount of £144 4s. 1d., which was not contested by the defendant. Of this sum the plaintiff's witness swore £75 was paid for the mill-stones, and the plaintiff claimed the balance, £69 4s. 1d., with interest thereon £5 2s. 6d.; and £2, being the amount paid by him for transporting the mill-stones to Kingston from Brockville, to which place the defendant had improperly sent them from Toronto.

Upon the whole evidence, the plaintiff's right to recover on the first count was scarcely contested. The dispute was as to what items of his claim he should recover. It was agreed that these should be submitted *seriatim* to the jury, who should say which of them they allowed, and should assess several damages on each; and that the defendant should be at liberty to move the court to reduce the verdict if any items allowed were not legally recoverable.

The jury gave a verdict for the plaintiff and £157 7s. 2d. damages, which they explained was thus made up:—

For the goods sold and delivered.....	£76	6	7
For the expense of attempted repairing of the broken stone.....	27	19	3
For the new bands to the unbroken pair of mill stones.....	2	10	0
For the cost of the new run of stones.....	40	0	0
For repairing damage to the machinery.....	12	0	0
For dressing the stones (the unbroken pair)	18	11	4
	<hr/>		
	£177	7	2

Then they allowed the defendant £20 for the under stone of the broken pair, as plaintiff still had it; and said defendant was to have the broken stone at his disposal.....	20	0	0
	<hr/>		
	£157	7	2

In Easter Term *Hagarty*, Q. C., moved to reduce the verdict, contending that the value of the chattel was the true

measure of the damages in such a case. He cited Sedgwick on damages, 291; *Clare v. Maynard*, 7 C. & P. 741; *Chesterman v. Lamb*, 2 A. & E. 129; *Ellis v. Chinnock*, 7 C. & P. 169; *Wrightup v. Chamberlain*, 7 Scott 598; *Penly v. Watts*, 7 M. & W. 609; *Holloway v. Turner*, 6 Q. B. 928; *Dakin v. Brown*, 9 C. B.; *Burnby v. Rollitt*, 11 Jur. 827; 2 Kent Com. 478; *McKenzie v. Hancock*, R. & M. 436.

E. C. Jones shewed cause, and cited *Chy.* on contr. 340; *Lewis v. Peake*, 7 Taunt. 153; *Mainwaring v. Brandon*, 8 Taunt. 202; *Borradaile v. Brunton*, 2 Moore 582; *Walker v. Hatton*. 10 M. & W. 249.

ROBINSON, C. J., delivered the judgment of the court.

In our opinion, the verdict given is sustainable, except as to the sum of £27 19s. 3d., which the plaintiff has shewn that he expended in attempting ineffectually to restore the mill-stone after it had been broken up and render it fit for use. That is a charge which we think is wholly inadmissible. If the plaintiff recovers back what he paid for the mill-stone, with interest and the charge he was put to in transporting it to his mills, we think he recovers all that the principle of such actions give him a right to. The attempt to restore the stone was made we think upon his own responsibility. If he had succeeded, he would not have had a right to recover back all that he had paid for it. Having failed in his attempt he is in a position to do so, and could equally have done so if he had abandoned the stone when it came to pieces from a fault, as the jury found, in its manufacture; but no authority, we are confident, can be found for giving him both. If such a principle were sanctioned, it would lead in some cases to very absurd consequences.

We think that £12 for repairing damage to the machinery occasioned by the stone flying to pieces might be allowed, being specially claimed in the declaration and the jury being satisfied that the breaking of the stone was not an accident such as could not fairly be charged against the manufacturer, but was occasioned by its not being properly secured by a sound and strong iron band, such as is usual.

The £18 11s. 4d., being the expense of dressing the pair

of stones that were rendered useless, we think might properly be allowed, on the same principle as expenses incurred with respect to articles bought in the confidence that they would prove such as the vendor was bound to furnish have been in several cases allowed, especially of late years, where such special damage is laid in the declaration.

Our opinion is, that the verdict should be reduced by striking out the £27 19s. 3d. only.

Rule accordingly.

BESSEY V. THE MUNICIPAL COUNCIL OF GRANTHAM.

Copy of by-law moved against described as annexed, but not annexed, to applicant's affidavit.

In an application to quash a by-law a paper was put in purporting to be a copy of the by-law, authenticated by the seal of the corporation, and certified by the township clerk to be a true copy of a by-law passed on, &c., (corresponding in date with that moved against;) also an affidavit of the applicant in which he swore that *the annexed* copy of the by-law (describing it accurately by title and date,) was a true copy of the by-law received by him from the township clerk. On shewing cause against the rule, it appeared, and was objected that the by-law was not annexed to the affidavit and there was no appearance of any paper having been attached thereto but held that the objection could not prevail.

Hagarty, Q. C., obtained in Easter Term a rule nisi, upon reading the affidavits and papers filed, that the Municipal Council shew cause why their By-law No. 39 should not be quashed on the ground that the Council has no authority by law for placing a part only of the township under a Board of School Trustees: that the by-law is partial in its operation; and that the Council have exceeded their authority in passing the same.

The By-law was intituled "An Act to Abolish Common School Sections in the Township of Grantham." It was passed on the 18th of December, 1852. It enacted that upon, from, and after the 20th day of that month of December, all the local school section divisions within the township should be abolished with the exception that the union school section No. 1, at Port Dalhousie, connected with Louth, should be and remain a separate school section, subject however, to such assessments of a general nature as might be lawfully imposed and entitled to receive its due share of the common school fund of the township: and that all the schools in the

township, except the above-mentioned union school section No. 1 should thereafter be managed under one board of five trustees, as provided for in the 20th clause of the School Act.

The counsel for the applicant, at the time of moving for the rule nisi, produced a paper purporting to be a copy of a by-law of the Municipal Council of Grantham, authenticated by their seal, and certified by the township clerk to be a true copy of a by-law passed by the Council on the 18th of December, 1852.

This paper did not bear the mark of having been annexed to any other paper.

At the time of making the application an affidavit was filed of Bessey the applicant in which he swore that "the annexed copy of a by-law of the Municipal Council of Grantham, chaptered 39, intituled "An Act to abolish Common School Sections in the Township of Grantham," is the copy of the by-law received from him by Charles Rolls, the township clerk of Grantham, and applied for by this deponent for the purpose of having the same quashed." Also another affidavit made by Bessey, stating that he had been one of the school trustees of Grantham for six years, and stating certain facts respecting the operation and effect of the by-law 39. There was a faint appearance of something having been annexed to the latter affidavit, but not of any paper having been annexed to the former; but the former affidavit and the copy of the by-law had the appearance of having been folded together.

On the return of the rule nisi *Vankoughnet*, Q. C., for the Municipal Council, admitted that such a by-law could not be sustained, being contrary to the letter and spirit of the School Act, 13 & 14 Vic. ch. 48, sec. 20, which allows of a by-law being passed authorizing all the common schools of a township to be managed by one board of trustees, but not of one being excepted, and the rest consolidated, as is provided by this by-law; and he said that the Council had no desire to sustain it: but, to save them from costs, he took as a preliminary exception that there was no properly authenticated copy of such a by-law as was moved against, for that the affidavit which spoke of an annexed copy of

a by-law had no paper whatever annexed, and consequently there was nothing authenticated or sworn to as being received from the county clerk.

Hagarty, Q. C., supported the rule against this exception.

ROBINSON, C. J., delivered the judgment of the court.

The provision of the statute 12 Vic. ch. 81, sec. 155, is, that any person interested in a by-law may apply "*for a certified copy of such by-law, and the township clerk shall upon such application furnish a copy of such by-law certified under his hand and the seal of the municipal corporation of which he is an officer, and the court may be moved upon production of such copy, and upon affidavit that the same is the copy received from such township clerk,*" to quash such by-law.

We do not think the objection is such as should prevail. We have here a paper certified by the proper officer to be a copy of a by-law 39, passed on the 18th of December, 1852, intituled, &c., sent under the seal of the corporation. The applicant produces it when he moves, and he swears that the *annexed* copy—which perhaps was not annexed, but which he identifies by describing it as a copy of the by-law of the Municipal Council of Grantham chaptered 39, and intituled "An Act," &c., giving its title exactly corresponding with the title of the one produced—is the copy received by him from the clerk. The statute does not require that the affidavit should refer to the copy as being annexed, or that it should be annexed, but only that the applicant should shew that the copy which he produces is the copy which he received; and that he certainly does here in effect, unless we are to suppose that there were two by-laws of the same date and title, and passed on the same day.

We must consider, also, that if the paper produced, verified as it is, be not a true copy, the corporation must know that, and be well able to shew it, so that there can be no risk in assuming that to be true which their officers have certified; and after all the only slip is, that the applicant has referred to the copy as annexed when perhaps it was not annexed, but only accompanied his affidavit,—though it has

been argued, and with some reason, that the court, as they granted the rule, should assume in the absence of any proof to the contrary, that it was in some way annexed, though the appearance of annexation may have become obliterated.

Rule absolute.

CAMERON V. CAMPBELL.

Costs—13 & 14 Vic. ch. 53, sec. 78.

Where a cause had been improperly brought in this court, and a verdict rendered for an amount within the division court jurisdiction—*Held*, that the judge had no power to order county court costs, the suit not having been commenced there.

This action was upon the common counts, claiming £200 in each count, and laying damages at £500.

The defendant paid £12 10s. into court, and the issue was upon the plaintiff's replication that more was due.

The jury found £12 10s. to be due above the amount paid into court.

Mr. Justice Draper certified that this was a proper cause to be withdrawn from the division court and tried in a superior court, and ordered that county court costs be allowed to the plaintiff on taxation. This certificate and order was signed in chambers on the 10th of August, 1853.

Hector, for the defendant, moved to rescind the certificate and order.

Read shewed cause, in the first instance, citing *Barker v. Hollier*, 8 M. & W. 513.

ROBINSON, C. J., delivered the judgment of the court.

From anything that appears to us we are not entitled to say that the plaintiff had any claim against the defendant beyond a money demand of an ordinary nature not exceeding £25, and therefore within the jurisdiction of the division court as defined in the statute 13 & 14 Vic. ch. 53, sec. 23. It signifies nothing that the plaintiff has claimed £200 in each count, and laid his damages at £500.

The case, then, being apparently within the jurisdiction of the division court, the 78th clause of the act provides that the costs shall be restrained to such as are allowed in the division court, unless the judge of the county court, or

superior court of record, shall certify that it was a fit cause to be withdrawn in the division court and to be commenced in such county or superior court, by which we take the Legislature to have meant, unless the judge of the county court, or superior court, (as the case may be,) in which the cause has been tried shall respectively certify that the cause was properly brought in the court in which it has been brought. We do not see that it was intended to give power to give the costs of the intermediate court where the cause has been improperly brought in the highest court. I can hardly see, indeed, upon what ground such a discretion would be exercised, because the case, whether in the division court or county court, would come before the same judge, and a jury might be had in the division court if the party should desire it. There would, it is true, be the advantage of an appeal in one case and not in the other. The Legislature might for this, or any other reason, have allowed the judge of the superior court to give county court costs in such a case, if they had thought it expedient, but we do not think they have done it, or intended to do it, by the words used in their act

Rule absolute to rescind certificate.

MAIR V. ANDERSON.

Commision to examine witness refused.

It is not imperative upon the court to grant a commission to examine witnesses out of their jurisdiction; and in this case,—where a suit was pending in Lower Canada for a claim arising there, and the plaintiff, having found one of the defendants here, served him with process upon the same cause of action, and desired the evidence of a witness in Montreal—the application was refused.

Freeland obtained a rule nisi for a commission in this case to examine witnesses in Montreal.

Hagarty, Q. C., shewed cause.

The facts appear in the judgment of the court delivered by

ROBINSON, C. J.—It has been already determined, on a former application in this same cause, that the granting a commission to examine witnesses resident out of the jurisdiction of this court was not imperative upon the court, but that they had a discretion to exercise on such application

though doubtless it would never be withheld but for some strong reason.

Since we made that decision the case in England of *Castelli v. Groome*, in the Queen's Bench, (21 L. J., Q. 308), fully confirms that opinion, and in *Duckett v. Williams* (1 Cr. & J. 510), the same thing had been determined.

The English statute, (1 Wm. IV. ch. 22, sec. 4) which authorizes the issuing of commissions in England in such cases is in language very similar to that of our own statute, 2 Geo. IV. ch. 1 sec. 17—that “*it shall be lawful*” for the court to issue such commissions. Our statute, indeed, more plainly evinces an intention that the court shall exercise a discretion in the matter, and shall grant or refuse it according as the ends of justice may seem to require, for it only authorizes the court to grant the commission “*upon hearing the parties*,” which implies that there may be something to consider before the application is acceded to.

We can scarcely conceive a stronger case for declining to grant a commission than the present as disclosed in the affidavits. The plaintiff, having had a transaction in Lower Canada with merchants resident there, makes a claim of a special character upon them arising out of their dealing. Nothing is so fit and just as that his claim should be decided by the tribunals of Lower Canada, being governed, as it must be, by the laws in force there. The plaintiff brought his action there in the proper court, and after an expensive litigation, has had judgment rendered against him in the highest appellate jurisdiction of that country, from which judgment it is, for all that appears, in his power to appeal to the judicial committee of the Privy Council in England. Instead of that while the suit is pending there, finding one of the defendants casually present in Upper Canada, he serves him with process upon this same cause of action, thereby attempting to draw the case from the proper jurisdiction after it has been adjudicated upon there in an action brought by himself. There are good reasons disclosed in the affidavits against giving facility to such a proceeding, besides those which obviously suggest themselves. The only additional ground advanced by the plaintiff in support of this renewed applica-

tion is, that he cannot prevail upon a witness who is resident in Montreal to attend in this province; that such witness is in the employment of the defendant or his partner and he suspects that they refuse permission for his attendance. If this be so the plaintiff has no reason to expect that a defendant, whom it is thus attempted to drag away from the proper jurisdiction to which the plaintiff himself had submitted his case, will give any aid to such attempt; and if the plaintiff meets with any difficulty in carrying on his suit here, it is only a difficulty brought upon himself by withdrawing his case from the proper tribunal, and refusing to submit to the laws and to the courts by which his rights in this matter ought to be decided.

Rule discharged, with costs.

SIDEY V. HARDCASTLE.

Ejectment by mortgagor—Mortgage outstanding when suit commenced—Notice required by mortgage to entitle mortgagee to possession after default, Effect of.

The defendant in ejectment produced a mortgage in fee given by the plaintiff on the land in question to one C., to secure the payment of £230 by instalments. By the terms of the mortgage the mortgagor was to remain in possession until default, and until three months's notice in writing, after such default, demanding payment. It appeared that the mortgage had been discharged by a certificate registered a week *after* the commencement of the action, and it was therefore contended that the plaintiff had no legal title when he began his suit.

Held that hemight nevertheless recover, for no notice was proved to have been given as required by the mortgage, and he was therefore entitled to possession against the mortgage.

EJECTMENT for part of lot 16 in the 5th concession of Hamilton. The defendant limited his defence to the land on the east side of the fence as it now stands, west of the present residence of the defendant, and between the premises of the parties as they at present respectively occupy. The plaintiff claimed the same as part of lot 16. The parties were disputing about the boundary line between them; the plaintiff owning the south east part of lot 16, and the defendant the south half of lot 15. At the trial at Cobourg before Draper, J., the plaintiff gave such evidence as seemed to entitle him to recover as regarded the question of boundary, proving that the defendant had enclosed about six acres of the plaintiff's land placing his fence too far to the west.

After cross-examining the plaintiff's witnesses on the point of the disputed boundary, the defendants' counsel, when the plaintiff's case was closed, took legal exceptions to the sufficiency of the survey on which the plaintiff relied; and on another ground also he contested the boundary which the plaintiff contended for, relying on the particular terms of the description in the patent. These objections were overruled, and then the defendant produced and proved a deed to himself for the south half of lot 15, from one Carpenter who, many years ago owned both lots, and who conveyed to those parties their respective portions. He next produced and proved a mortgage in fee, given by the plaintiff to Carpenter on the 9th of August, 1851, upon his portion of the lot 16, to secure to Carpenter the payment of £230, a portion of the purchase money to be paid in annual instalments of £38 6s. 8d. each, on or before the first day of May 1852, 3, 4, 5, 6, and 7, with interest. This mortgage was executed on the same day that Carpenter conveyed the land to the plaintiff and by the terms of the mortgage the mortgagor was to remain in possession till default made, and until three months notice should be given in writing that in consequence of such default the mortgagee desired to enter into possession;—and if the payments should be duly made the mortgage was to be void.

At the trial the mortgage was produced, with a certificate of discharge indorsed upon it by the registrar of the county as being registered on the 20th of May, 1853. The defendant relied on the mortgage as shewing that the title was out of the plaintiff when he brought this action, which was commenced on the 27th of May, 1852.

The learned judge held that the effect of the statute 9 Vic. ch. 34, sec. 24, was to make the registry operate as a re-conveyance from its date only, not retrospectively; and on that ground nonsuited the plaintiff.

Cameron, Q. C., obtained a rule nisi to set aside the nonsuit. He cited *Doe dem. Bowerman v. Sybourn*, 7 T. R. 2; *Goodtitle dem. Jones v. Jones*, Ib. 47; *Doe dem., Hodsden v. Staple*, 2 T. R. 684; *Doe dem. Brandon v. Calvert*, 5 Taunt. 170; *Doe dem. Burdett v. Wrighte*, 2 B. & Al.

710; Doe dem. Putland v. Hilder, Ib. 782; Bartlett v. Downes, 5 D. & R. 526; Doe dem., Blacknell v. Plowman, 2 B. & Ad. 573.

Vakoughnet, Q. C., contra, cited Wilkinson v. Hall, 3 Bing. N. C. 508; Doe dem. Higginbotham v. Barton, 11 A. & E. 314; Brierly v. Kendall, 16 Jur. 449; Fenn v. Bittleston, 7 Ex. 257.

ROBINSON, C. J.—I think the plaintiff ought not to have been nonsuited; for that the defendant after contesting the question of boundary upon the trial, should not have been allowed to go into a new case of a wholly different kind, and set up a satisfied mortgage given to a third party as a bar in the plaintiff's recovery. But if he could properly set up this new case, still I do not see that the plaintiff was in any difficulty in consequence of the mortgage.

The defendant did not shew that the plaintiff had made any default in paying up this now satisfied mortgage. His remaining in possession is *primâ facie* evidence that he had not; for by the very terms of the mortgage the mortgagee was to be allowed to enter into possession if default should be made, but not before default. And this right of possession against the mortgagee would entitle the mortgagor to recover possession against a stranger. It would operate as a demise from the mortgagee and give him complete control over the property as tenant. He was something more than a tenant at will to the mortgagee under this proviso, for there was, under any circumstances, a right of possession for three months, until the notice which might be given should expire. In Doe dem. McKenney and wife v. Johnson (4 U. C. R. 508), we determined that a satisfied mortgage could not be set up in ejectment to defeat the title of the true owner of the estate, and our decision in Doe dem. Carey et al. v. Cumberland, (T. T. 1851), was not at variance with that case, because in the latter we were asked to entertain the presumption that the mortgagee had reconveyed, when such presumption might, for all that we could see, defeat and not promote the ends of justice—the party who claimed the benefit of the presumption not being the

person who had given the satisfied mortgage, nor any person who was proved to be claiming under him. We went upon the distinction taken in *Doe dem. Hammond et al. v. Cooke et al.* (5 Bing. 174), and in *Keene v. Deardon* (8 East 263, 267) (a).

It seems strange, and I confess I think not very creditable to our system of jurisprudence, that a mere stranger, who never had any interest in the mortgage, should be allowed to defeat the action of the true owner of the estate by setting up a mortgage to a third party, whether such mortgage be satisfied or unsatisfied.

But here we have a stranger attempting to obstruct the recovery of the true owner of the estate by setting up a mortgage under which the mortgagee himself had never interfered with the possession, and under which, for all that is shewn he never could have done so, for it was not proved that there had been any default. This, too, was a mortgage which was subject to a defeasance in case certain moneys should be paid on or before certain days; which moneys it appears were all paid four years before the last instalment had become due, and a certificate of discharge registered, though not until this action was commenced. It ought to have been, and I dare say was, the intention of the Legislature, by their enactment in 4 Wm. IV. ch. 16, which is repeated in the 24th clause of 9 Vic. ch. 34, that the registration of the certificate of discharge should have the effect of extinguishing the security so that it could never be set up afterwards as a subsisting title for the purpose of defeating the reco-

(a) The judgment given in *T. T. 1851* does not appear to have been reported, but there is a report in 7 U. C. R. 494 of a rule previously argued in that case which turned on a different point, and in which the facts stated differ from those proved on the subsequent trial, alluded to by the Chief Justice, which were as follows: It was an action of ejectment on the several demises of James Scott, George Carey the elder, and George Carey the younger. It was proved that George Carey, sen., being in possession of the land in 1836, mortgaged in fee to James Scott; that upon an execution in favor of Scott against Carey, the land was sold at the sheriff's sale in 1839, to one Cahill, and out of the moneys arising from the sale the mortgage debt, was paid in full to Scott's attorney. The defendant gave no evidence of title and the court on that ground held that it could not properly have been left to the jury to assume a reconveyance, and that a verdict must be entered on the demise of Scott, though they intimated that the writ of possession might probably be stayed on the application of the mortgagor, under 7 Geo. II., ch. 20, as the case would probably be considered as coming within the spirit of that act.

very of the true owner. But whether it would be right or not to give to that provision a retrospective operation as a reconveyance of the estate at the time of the certificate being given there was in this case no proof of default in paying the mortgage money ; and if a reconveyance were necessary the jury should, I think be recommended to presume that it was done because it was the plain duty of the mortgagee to reconvey when he was paid in full. This is no case of a satisfied term which may be often intended to be kept alive to serve particular purposes, and of which, therefore, the courts do not now recommend a surrender to be presumed. It is the case of a mortgage in fee, paid up, and for all that appears, paid up in time to make such payment the performance of the condition subsequent thereby defeating the estate. I think there should be a new trial without costs.

DRAPER, J.—My first impression was, that we were not called upon to decide any other point than the one which has been raised by the plaintiff's counsel, both at the trial and on the argument ; namely the operation and effect of this reconveyance by a certificate of the mortgage money being satisfied. My impression is, though I did not make any minute of it on my notes, as no point was raised which made it important, that the instalment due on the 1st of May, 1852, had not been paid before the day of trial (and nothing in the argument was stated to remove this impression). On this question I retain the opinion expressed by me at the trial that the reconveyance operates no further back than the day of its completion, according to the statute ; and that there could be no presumption of a reconveyance when there had been no payment ; and so far, therefore, I am of opinion the rule should be discharged. The recent case of *Thornton v. Court* (17 Jur. 151), though not bearing on the point immediately in question, confirms my view as to the legal rights of mortgagors in fee under such circumstances. But since the argument my brother Burns has pointed out what escaped attention at the trial—that, according to the express terms of the proviso in the mortgage, the mortgagee would not be entitled to the possession on default of payment until

demand in writing made and the agreement of the parties is clearly expressed that until three calendar months after this demand it was not intended that the mortgagee should enter. This right to enter, so limited, is coupled with a power of sale ; but, as it is worded without proof of demand at all events the mortgagee cannot be said to have had a right of possession of the mortgaged premises. He should, therefore, as it now appears to me, have been allowed, and perhaps would have been, had the point been raised, to assert this right and to have tried the question of disputed boundary.

I am not sure however that I should have taken this view at the trial had the point been raised ; for even now I have not adopted it without some degree of hesitation, arising from the difficulty I have felt in determining the true nature of the interest the mortgagor has under the deed after default, because of the uncertainty of the time when the three calendar months will begin to run ; in other words, what sort of estate or tenancy, the proviso, covenant, and agreement, create in the mortgagor after an admitted default.

BURNS, J.—The case seems at Nisi Prius to have turned upon the effect of the certificate of the mortgage being satisfied, rather than upon the construction of the mortgage deed put in on the part of the defendant. The plaintiff did not rely as he might have done, upon the terms of that deed ; but inasmuch as the defendant relied upon that deed to destroy the plaintiff's right of action, and though the plaintiff seems to have given way to the defendant in that respect, and thought more of his stand upon the effect to be given to the certificate, yet now, the question being whether the plaintiff had a right of action notwithstanding the evidence of the defendant, I think the whole matter is open to be considered, and therefore the case resolves itself into two questions ; first, the effect to be given to the certificate of the mortgage being satisfied, and secondly, whether the mortgage in fee, containing the terms and stipulations it does contain, prevents the plaintiff contesting with the defendant the boundary of the land.

The two statutes relating to such certificates are 4 W. IV

ch. 16, and 9 Vic. ch. 34, sect. 24. It is quite clear the certificate of the mortgage money being satisfied, or that the condition has been performed, has operation only as a release of the mortgage, or as a reconveyance of the estate, from the time that the registration of the certificate is completed. In this respect the certificate differs from the effect of a conveyance or a reconveyance, which operates from the delivery of the deed. The proviso that the certificate, if given after the expiration of the period within which the mortgagor had a right to redeem, shall not have the effect of defeating any title other than a title remaining vested in the mortgagee, proves that the legislature intended the registration of the certificate to cause the title of the mortgagee to cease, and that such act is equivalent to the delivery of a reconveyance. A great mistake has been made in the proviso in the 9th Vic. ch. 34, if the original act be the same as the printed one, for "mortgager" has been substituted for "mortgagee," which would make a great distinction. The certificate in this case, being registered only a few minutes before the trial, could not therefore affect the action, which must be determined according to the title which the plaintiff had when it was brought.

Then, supposing the mortgage not to have been released or discharged, and I think we must so look at it for the purpose of this action, we must determine whether this deed destroys the plaintiff's right to maintain this action. According to my view of the cases, that question depends upon the effect to be given, and the construction to be placed upon, the conveyance creating the mortgage. The cases I allude to more particularly are *Doe Fisher v. Giles* (5 Bing. 421), *Wilkinson v. Hall* (3 Bing. N. C. 508), *Doe Roylance v. Lightfoot* (8 M. & W. 553), *Wheeler v. Montefiore* (2 Q. B. 133), *Doe Parsley v. Day* (2 Q. B. 147), *Doe Lyster v. Goldwin* (2 Q. B. 143), *Gale v. Burnell* (7 Q. B. 850), *Rogers v. Grazebrook* (8 Q. B. 895). In the present case the mortgage is in fee. There is an agreement in these words: "And it is further declared and agreed by and between the said parties to these presents, that if the said party of the first part, his heirs, executors, or administrators, shall not pay to

the said party of the third part, his executors, administrators or assigns, the said instalments as they become due, and interest, according to the true intent and meaning of the proviso hereinbefore in that behalf contained; and the said party of the third part, his executors, administrators and assigns, shall after the time limited for such payment has expired, have given to the said party of the first part, his heirs, executors or administrators, or have left for him or them, at his or their last or most usual place of abode in this province, notice in writing demanding payment of the said principal sum, or so much thereof as may be then due and owing and interest; and three calendar months shall have elapsed from the delivery or leaving of such notice, &c.,—it shall and may be lawful to and for the said party of the third part, his heirs and assigns, without any further consent or concurrence of the said party of the first part, his heirs and assigns, *to enter into possession of the said lands, hereditaments and premises, and to receive and take the rents and profits thereof*, and whether in or out of possession of the same to make any lease, &c.” Then follows a covenant of the mortgagee, “that no sale or notice of sale of the said lands, hereditaments, and premises, shall be made or given, or any lease made, or any means taken for obtaining possession thereof by the said party of the third part, until such time as three calendar months’ notice in writing as afore-said shall have been given,” &c. Then follows this proviso: “That until default shall be made in payment of the said sum of £230 and interest, after notice in writing demanding payment of the same as hereinbefore provided, it shall be lawful for the said party of the first part, his heirs and assigns, to hold, occupy, and enjoy, the said lands, hereditaments and premises, with the appurtenances, without any molestation, hindrance, interruption, or denial, of, from or by the said party of the third part.”—Although the legal estate be vested in the mortgagee, yet the possession, until certain things be done, is, by reason of these agreements and provisoes, vested in the mortgagor. The mortgagee until default made, and until he complied with what he agreed to do, and having stipulated that the possession of the mort-

gagor should be lawful until that were done could not have maintained an action to recover the possession. More than that, had he in the meantime got possession without the assent of the mortgagor, the mortgagor could have maintained an action against even the possessor of the legal estate to recover the possession of the land. This principle was affirmed in this court, in *Doe Barker v. Crosby* (7 U. C. R. 202). The action of ejectment concerns the possession of the land only at the time alleged; and the production of this mortgage deed, though it vested the legal estate in the mortgagee, yet, so far from showing that he was entitled to the possession, proved that he was not, without something more being proved of which there was no evidence, and therefore did not, in my opinion, destroy the plaintiff's cause of action. The question between the plaintiff and defendant was one of boundary, and the plaintiff sought to recover part of the land mentioned as he alleged, and which was included in the mortgage. If it be said that the plaintiff never had been in possession of the land, and having conveyed his rights away must fail for that reason, I think the answer to it is two-fold. First, I consider the provisions of this deed do qualify the estate thereby granted, in this way that they amount to a redemise of the premises until default shall happen and until the mortgagee gives the requisite notice; and do not merely amount to a covenant on the part of the mortgagee, to which the mortgagor must resort, if the terms be not complied with. If they do not amount to a redemise the mortgagee might have brought his action immediately on obtaining the deed; but this I do not think he could have done, even after default, without also giving the notice stipulated for. A case was tried before myself at the spring assizes, 1850, at L'Orignal, *Doe Lemoine v. Long*, brought by a mortgagee against the widow of the mortgagor, who had remained in possession after her husband's death; and the mortgage deed contained a similar proviso to the present. The stipulation was that it should be lawful for the mortgagor, &c., to remain in possession until default should be made in payment, and until six months' notice in writing demanding payment should be given. The instalments were all due, but

no notice of demand was proved, and I thought the plaintiff could not recover. The court in Easter Term after, upon a motion made upon consideration, refused a rule. The insertion of such stipulations meets what is thrown out by Best, C. J., in *Doe Fisher v. Giles*. He says, "The possession of his (the mortgagor's) estate is secured to him until a certain day, and if he does not redeem his pledge by that day the mortgagee has a right to enter and take possession. From that day the possession belongs to the mortgagee. If this situation exposes mortgagors to any hardship, they must guard against it by an alteration in the terms of the mortgage deeds." If the terms of the deed in the case before us amount to a redemise of the premises, then the plaintiff has a right of possession conferred upon him to whatever land the deed did legally and properly transfer to the mortgagee, and so the plaintiff would, after the deed executed, be situated just as he was before. If the want of possession of the strip of land sought to be recovered be any obstacle then, secondly, it would prevent that part passing to the mortgagee, and in such case the plaintiff could rely on his previous title. The mortgage deed either passed the strip of land, or it did not. If it did, then it was redemised; or if it did not, then the deed cannot stand in the plaintiff's way.

I think the plaintiff notwithstanding the mortgage deed, should have been allowed to try the question.

Rule absolute.

ASHFORD V. MCNAUGHTEN.

Mortgage by plaintiff to a third party set up by defendant in ejectment—Effect of.

In an action of ejectment it was admitted that the plaintiff had mortgaged the premises in question to a building society, the condition of the mortgage being to pay 10s. on the first day of every month until the objects of the society, as stated in it, should be fulfilled. No default had been made, and it was proved that since action brought the society had released to the plaintiff their claim to the land in question.

Held, that the plaintiff could not recover, for the expiration of the mortgage being uncertain, he was only a tenant at will when the suit was brought, and therefore not entitled to the possession; *Robinson, C.J.*, dissenting, on the ground that a stranger to a mortgage cannot, in any case, defeat a recovery by the mortgagee, by setting up the mortgage where there has been no default, and the mortgagee by the terms of the deed is entitled to possession till default.

EJECTMENT for part of lot No. 1, in the first concession of the Township of Hope.

At the trial at Cobourg, before Draper, J., it was admitted that the plaintiff, being owner of the land claimed, mortgaged the premises in fee to a building society on the 2nd of April, 1850, the condition of the mortgage being to pay 10s. on the first day of every month until the objects of the building society as stated in it should be fulfilled; and the mortgage contained the usual stipulation that until default made, it should be lawful for the mortgagor his heirs or assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy the said lands, and to receive the rents, issues, and profits, without the molestation, &c., of the mortgagee or any person claiming under him; and that upon the due performance of the condition mentioned in the mortgage the deed should become void. There had been no default, and it was shewn further, that, since this action was brought, which was on the 19th of April 1853), and indeed since issue joined, so much of the land as was in question in the action had been released from the mortgage—*i. e.*, the mortgagees had by deed quitted their claim and reconveyed the land to the plaintiff.

The defendant's counsel objected that the plaintiff could nevertheless not recover, not being seised of the legal estate when he brought his action, in consequence of his mortgage to the building society.

The plaintiff's counsel contended, that the right of possession being reserved to the plaintiff in the mortgage, he could on that rest his right to recover possession against a stranger, as well as against the mortgagee.

The learned judge considered that as the plaintiff was out of possession of the piece of land claimed when the release was executed, the release had nothing to operate upon; and that at any rate the title was out of the plaintiff when he brought this action, and so he could not recover—and he therefore directed a nonsuit.

Vankoughnet, Q. C., moved to set aside the nonsuit.

Cameron, Q. C., shewed cause.

This and the preceding case, of *Sidey v. Hardcastle*, were argued together, and the same authorities were cited in each case.

ROBINSON, C. J.—I think for the reasons given by me in the case of *Sidey v. Hardcastle*, that the plaintiff should have been allowed to recover; for this case is even stronger in favour of the plaintiff, it being expressly admitted here that there had been in fact no default in the mortgagor. That being so, considering the terms of the mortgage, the mortgagor had always had the right of possession, not the mortgagee. The latter could not, under such circumstances, have dispossessed the mortgagor, nor held possession against him if he had surreptitiously obtained it, for it would be against the express deed of the parties. He would not be suffered to maintain ejectment in order to gain possession against his own deed and surely a stranger can make no use of the mortgage to the prejudice of the mortgagor which the mortgagee himself could not do.

I do not see that in this case, or in the other, of *Sidey v. Hardcastle*, any difficulty is occasioned by the circumstance that the piece of land which is claimed in each action has been out of the actual occupation of the mortgagor, for this is a mere dispute about a boundary. Neither party has pretended any claim to more than their titles cover. If there has been any encroachment it has been made under an erroneous impression as to the true boundary, no disseizin being intended, as the course of the defence upon the trial shewed. We have had this point before us in other cases, and have never held that under such circumstances there is such a disseisin of the land erroneously inclosed as will prevent its passing with the rest of the lot under a conveyance from the owner. If it were otherwise the purchaser of an estate would never be in a position to try a question of boundary if the encroachment had been made before his time. The owner having given such a mortgage as was given in this case, is in no worse position to try the question of boundary than he would have been if he had made no such mortgage; for he has given no right of possession over any land to which the mortgage can extend, unless there has been a default on his part in complying with the terms of the mortgage.

I do not think any stress could be laid in this case upon the release of the piece of land in question, which was exe-

cuted in favor of the plaintiff while the action was pending, because the question is as to the state of the title when the action was brought and that question cannot be affected by a conveyance made after issue joined. My opinion proceeds upon the ground that in this case, the mortgage by its terms gives the mortgagor a right to remain in possession, *and to receive the rents and profits*, until default made, and upon the admission that there has been no default. Under such circumstances the mortgagee could not be allowed to dispossess the mortgagor; and it seems to me to follow, as a necessary consequence, that no person claiming under him, and much more that no stranger, can make use of that mortgage, either to dispossess the mortgagor or to maintain himself in possession against the mortgagee. In *Wheeler v. Montefiore* (2 Q. B. 133), *Doe dem. Lyster v. Goldwin* (Ib. 143), *Doe dem. Parsley v. Day* (Ib. 147) and *Doe dem. Roylance v. Lightfoot* (8 M. & W. 564), the effect of such mortgages and provisoes was considered; and though the judgment in the several cases are not quite consistent, I gather from them that upon such a mortgage as this, which not merely gives a right to the mortgagor to remain in possession, but stipulates that he is to receive the rents and profits till default, he is at least tenant at will to the mortgagee so long as there has been no default and cannot be dispossessed by him without demand of possession, although it may be that no term can be held to have been created for want of any determinate time. But, surely while the mortgagor is in that situation that he requires a notice from the mortgagee before he can be dispossessed, his right of possession cannot be resisted under that deed by a mere stranger who has given and could give him no notice, and while the mortgagee has done nothing to determine his will. If the mortgagee were bringing an action against the mortgagor, it might be held that that was in itself a determination of the will, (though I do not consider that without default even he could dispossess the mortgagee;) but nothing which this defendant could do could put an end to the right of the mortgagor to continue in possession and to receive the profits of the estate.

I think the case of Doe dem. Lyster v. Goldwin (2 Q. B. 144) affords strong evidence that the court under the circumstances of this case, would have had no difficulty in upholding the plaintiff's legal right to possession.

It appears, from notes to the American edition of Adams on Ejectment, that in courts acting there on the principles of the English Common Law, a mortgage before foreclosure or entry is not a legal title which a stranger can set up, and that it can only be used by the mortgagee or his representatives. I have not found English authorities upon that point; and in holding the opinion which I do—that a stranger to a mortgage cannot defeat a recovery in ejectment by the true beneficial owner by setting up the mortgage, when there has been no default and when according to the very terms of the deed the mortgagee himself is bound to allow the mortgagor to continue in possession and to receive the rents and profits till default—I am sensible that there is much in English authorities which is apparently inconsistent with this opinion. My brothers, I believe, take a different view of the question, and think the nonsuit was proper. The rule therefore will be discharged.

I will remark that I think there is less difficulty in coming to the conclusion which I have formed since the passing of our late statute 14 and 15 Vic. ch. 114, because the provisions of that act seem intended plainly to afford a remedy whenever the plaintiff is entitled to *possession*. There is no longer a necessity from the form of proceeding, to make out that the plaintiff has a claim to any certain term as there was when John Doe was claiming under a supposed demise; and by the form of the judgment as given in that act it is merely adjudged that the plaintiff shall recover his possession—not stating that he is to recover any term. The form of plea given, also, raises simply the issue whether the plaintiff is or is not entitled to the *possession* of the property for which the defendant appears; and it seems clear to me that the plaintiff's *prima facie* case of right to possession was not in this case disproved by shewing a mortgage which, coupled with the admission that there was no default, in the very terms of it entitled him to hold the possession, and to

receive the rents and profits, even as against the mortgagee himself.

DRAPER, J.—This is not a case in which the plaintiff, having all the beneficial interest in a property, has nevertheless some difficulty arising from a dry legal estate, created for some purpose which has been satisfied, being still for all that is actually proved, outstanding in some third party. There is no room here for the presumption of a conveyance consistent with the *possession* of the plaintiff, and which will unite the legal estate with the possession. We have before us all that has been done; namely, the mortgage with its proviso retaining possession until default; and the release, not of the debt or obligation to pay, but of a portion of the land upon which that debt was secured. It is not pretended that the purposes of the mortgage deed to the building society are satisfied, and there is no room for presuming any other conveyance than those which are admitted.

As to the release—without entering into the question whether it could operate by reason of the defendant being in possession of the piece of land described in that instrument, and so, the plaintiff having no estate remaining in him, because he had conveyed all his estate by the mortgage deed, and no actual possession—I think it may be at once disposed of by the consideration that it was not given until after issue joined. The action of ejectment, like every other action, is now commenced by writ, tested on the day of its issuing. The only plea on the record is a denial of the plaintiff's right to the possession of the property claimed; and by the express words of the statute the question at the trial on this record is, “whether the statement in the *writ* of the title of the claimant is true or false.” I understand this to refer to the date of the writ as the time when the title of the claimant must be shewn to exist; and as this release, however effectual prospectively, can have no retrospective operation it appears to me it is of no use to the plaintiff for the maintenance of this action.

The only question, therefore, for determination is, whether the mortgage deed vested such an estate in the plaintiff as to

enable him to maintain ejectment for the land mortgaged, or any part of it ; and this must be determined on the construction of the deed itself. The conveyance is in fee. It is executed for the purpose of securing to the mortgagee the payment of ten shillings on the first day of every month succeeding the date of the mortgage, *until* the objects of the building society (the mortgagees) shall be attained ; and it is declared and agreed by and between the mortgagor and mortgagees that, until default, it shall be lawful for the mortgagor to have, hold, occupy, possess and enjoy the said lands, &c., and receive and take the rents, &c., without the let, &c., of the mortgagees. There has not been any default ; but the objects of the building society have not been attained, nor is it shewn when they will be, or that in the nature of their transactions there can be any certain definite period named when they will be.

There is a peculiarity in this mortgage—viz., that it is given to secure an indefinite number of monthly payments, instead of, as is most common, to pay a sum certain at a fixed day, with interest at stated periods. *Smartle v. Williams* (Salk. 245, S. C. 3 Lev. 388, Holt 478, Comb. 247). appears to have been a case of the latter kind ; and Lord Holt says, "*Upon executing the deed of mortgage, the mortgagor, by the covenant to enjoy till default of payment, is tenant at will.*" In *Powsley v. Blackman* (Cro. Jac. 659) which is always cited as a leading case on this subject, there was a mortgagee in fee by a bargain and sale, with a proviso and agreement between the parties that the mortgagee should not intermeddle with the actual possession of the premises or perception of the rents thereof, until default of payment of the said sums or any part thereof. In that case it is said that "it is not a covenant or agreement with the bargainee that he should enjoy it during those years, for then it would have amounted to a lease for years ; but that the bargainee would not meddle with it and to leave him (the bargainer) in possession as he was, &c., which cannot be a lease for years." According to the marginal note, this proviso only made the mortgagor *before default* tenant at sufferance, "and not *tenant at will*, as he would have been on a covenant

that he should take the profits until default of payment." There is a very learned note to *Keech v. Hall* in *Smith's Leading Cases*, vol. i. 293), in which, after reviewing the various decisions down to that time, he concludes that, if there be in the mortgage deed an agreement that the mortgagor shall continue in possession till default of payment on a certain day, he is in the meanwhile termor of the intervening term. *Wilkinson v. Hall* (3 Bing. N.C.508) supports this view. Tindal, C.J., observes: "It appears that the legal estate in fee was in the plaintiff on the 3rd December, 1833, and that it vested in Wynn Ellis on the 5th, by a deed of mortgage. The effect of that deed was to vest the fee in Wynn Ellis from the day it was executed; and even the proviso for reconveyance on payment of principal and interest does not affect his legal right to the fee: the question is, whether a subsequent part of the deed does not operate as a re-demise of the premises to the mortgagor for a term of seven years; and we think that it has that effect. After the covenant for reconveyance becomes a proviso that the mortgagee will not call in his principal till 1840, then, if the interest were kept down, that it should and might be lawful for the mortgagors peaceably and quietly to have, hold, occupy, possess and enjoy (the mortgaged premises,) and to receive and take the rents, issues and profits thereof, and of every part thereof, for their respective own use. It is contended on the part of the defendant that such power is only vested in the mortgagor on the payment of £13,000 on the 5th of June, 1834; but the proviso for payment on that day is altered by the mortgagee's subsequent covenant not to call in the money till 1840; and the powers conferred on the mortgagor vest in him a leasehold estate for seven years. Nor would this be an injury to the mortgagee, or in any way impair his security, for he is still empowered, if the interest be unpaid to enter on the premises to compel payment of principal and interest:" and his Lordship cites *Bac. Abr. "Leases" K*, to shew that such a proviso and covenant amount to a lease for years. The principle is, that whenever it appears to be the intent of the parties that one shall divest himself of the possession, and the other come into it *for some determinate time*, no matter what form

of words are used, it shall amount to a lease—(See 6 Co. 35). Lord Abinger adopts a similar view in *Hitchman v. Walton* (4 M. & W. 409), saying, in regard to the mortgagor, "If there be a stipulation that he shall be allowed to remain in possession *for a time*, by the very terms of the deed he is a tenant for that time, and is in possession for a *term*." Lord Denman, in *Doe Parsley v. Day* (2 Q. B. 153), observes, upon *Wilkinson v. Hall*, that a passage in the *Touchstone* was not brought to the notice of the Court in that case, and enforces the necessity of certainty as to time, without which, it may be inferred from that judgment, the agreement that the mortgagor should retain possession until default would amount to a covenant only, and not to a lease.

Now in the present case, the conveyance of the fee is subject to the payment of 10s. per month until the objects of the building society are attained. There is in this no determinate time. It may, for all we know to the contrary last for six months, or for six, or for sixty years. It cannot, on the face of the deed, be predicated when the purposes of the building society will be attained; and without that, there is no definite term created. It cannot be construed as a tenancy from month to month on payment of a monthly sum of 10s., because such a tenancy might be put an end to by the mortgagee, and because such a construction would be contrary to the obvious intention of both parties—at most it can only be a tenancy at will.

I am of opinion, therefore; that in this case there was no re-demise; and therefore, that, the plaintiff not being entitled to recover the possession for want of legal title in himself, this rule should be discharged.

I have not been able to bring myself to the conclusion that our ejectment act either has made, or was intended to make such a change in the character of the action of ejectment as to give the plaintiff a right to recover the possession under the circumstances of this case, and against the authorities to which I have referred; for, although the only plea allowed is, that the plaintiff is not entitled to the possession of the property for which the defendant has appeared, yet the inquiry at the trial is, by the express words of the

seventh section, not limited to the terms of the plea, but "whether the statement in the writ of the *title of the claimants* is true or false."

BURNS, J.—The release of the mortgagees to the plaintiff, proved at the trial, cannot entitle the plaintiff to maintain this action, for the reasons given by my brother Draper. The case then, must turn, like that of *Sidey v. Hardcastle*, on the terms of the mortgage deed. I do not look upon the terms contained in this deed as merely amounting to a covenant that, until default made in the monthly payments, and the payment also of all fines, forfeitures, and other payments that may be due in respect thereof, the mortgagor may remain in possession of the premises; but I think the clause which expresses it to be the agreement of the parties that, until default shall happen to be made in some or one of the payments in the proviso mentioned, or in the doing, observing, performing, fulfilling or keeping, some one or more of the agreements set forth, it shall and may be lawful to and for the mortgagor peaceably and quietly to have, hold, use, occupy, possess, and enjoy, the lands, &c.—made it lawful for the mortgagor to remain in possession. If this agreement amounted but to a covenant, then it would follow that, as respects the possession, the mortgagor would be a trespasser as soon as he signed, sealed, and delivered the mortgage deed. That consequence could never have been intended, and I do not think it follows as a legal result of the terms inserted in the deed. This agreement, in my opinion, constituted the mortgagor tenant at will to the mortgagee. Although it may be considered a re-demise by the mortgagee to the mortgagor, yet no time is specified for which it can be said the mortgagor shall hold the premises and consequently no definite term is created. In this respect, I apprehend, the term of re-demise must be as definite and certain,—either by the terms of the deed itself, or by reference to something made certain by the deed, by which the determination of the term can be ascertained,—in a mortgage deed as it would be required in an indenture of lease. A lease made to one generally during the coverture of A. and B. would create but a tenancy at will, by reason

of the uncertainty how long the coverture will last.—Bac. Ab. "Lease" L. 3; see the Bishop of Bath's case (6 Coke 35) Richardson v. Langridge (4 Taunt. 128.) This species of tenancy arises in the present case by implication of law, for want of something by which we can say the term is to be determined. It is impossible to ascertain by the terms of the deed, or by anything therein referred to, at what time the objects of the building society will be attained. It is said in the Bishop of Bath's case, that "when a lease for years shall be made good by reference, the reference ought to be to a thing which has express certainty at the time of the lease made, and not to a possible or casual certainty." The re-demise to the plaintiff being but as tenant at will by implication from the terms of the deed, it follows that it is not such an estate as will enable him to maintain an action of ejectment, and therefore the nonsuit was proper.

I have not failed to consider the effect of our new ejectment act; but the construction I at present put upon the act is, that the Legislature did not intend to alter the law of titles, or what titles should be necessary to maintain ejectment, but merely to alter the form of the remedy. The language used is, I think, consistent with such intention, and not contrary to or inconsistent with it.

Rule discharged.

WATERS ET AL. V. RUDDELL ET AL.

14 & 15 Vic. ch. 64—*Replevin*.

The declaration in an action of replevin under 14 & 15 Vic. 64, was for "*taking* and unjustly detaining" certain goods. The defendants pleaded "*non ceperunt*" and a special plea of lien. The evidence shewed that the defendants came lawfully by the goods, but that they had no right to detain them.

A rule for nonsuit was discharged, as the plaintiffs had succeeded on the second plea, and thereby established their right to the goods; and *semble*, that although the defendants had obtained a verdict on "*non cepit*," yet the plaintiffs were entitled to judgment generally—such issue being either immaterial or determined in plaintiffs' favour by proof of detention.

This was an action of replevin, brought under our statute 14 & 15 Vic. ch. 64, for *taking* and unlawfully detaining wheat of the plaintiffs.

The defendants pleaded *non ceperunt*, and a special plea of lien, upon which nothing turned.

At the trial at Chatham, before McLean, J., the plaintiffs failed in shewing any unlawful taking ; for the wheat came into the defendants' hands in the regular course of business as warehouse-keepers, and they were only liable for detaining it and refusing to deliver it up, on a claim of lien which they failed to establish.

A nonsuit was moved for, on the ground that the plaintiffs had gone for an illegal taking as well as an illegal detention, and had failed on the issue of *non cepit*, and therefore must fail in the cause. The plaintiffs' counsel moved to amend the declaration by omitting that part which charged the taking ; but the learned judge refused, because of the wording of the eighth section of the statute, which is, "that where the original taking of the goods, chattels, or other personal property, is not complained of, but the action is founded on a wrongful detention thereof, the declaration shall conform to the writ, and may be the same as in an action of detinuc."

The defendants' objection was overruled,—leave being reserved to him to move to enter a nonsuit upon it, and in Easter Term last *Leith* obtained a rule nisi accordingly, to which, in this term, *VanKoughnet*, Q. C., shewed cause, citing *Evans v. Elliott*, 5 A. & E. 142. *Leith*, in reply, cited *The six Carpenters' case*, 8 Co. 146.

ROBINSON, C. J.—The evidence shewed clearly that there was no right of lien in this case ; that the charge of which the defendants demanded payment before they would let this wheat go was for storage of other wheat brought to the defendants by another person to whom they looked for their charges (though the wheat was in fact brought by that other person as agent for these plaintiffs) ; that they allowed that wheat to be shipped, looking to the person who had stored it with them for their charge, and that they afterwards detained this wheat, subsequently bought for the plaintiff by other parties and stored by such parties with the defendants, and for which wheat they were offered their charges. The defendants contended that a new assignment was necessary. We think it clear upon the evidence that the defendants established no right of lien in respect to this wheat, and that the detention

was therefore wrongful, and the plaintiffs were entitled to succeed upon the plea which justified the detention.

But the defendants object that the plaintiffs, having brought replevin under our statute 14 & 15 Vic. ch. 64 for *taking* as well as detaining, were bound to prove an unlawful taking, and cannot recover upon this record on proof of a wrongful detention alone. There was clearly no wrongful taking, but the plea denies simply the taking as charged in the declaration. The defendants say they did not take in manner and form, &c., which is the common form of the plea *non cepit*. So, in the declaration, the allegation is only that the defendants took the goods, without saying that they unlawfully or wrongfully took them.

The form of the writ contained in our statute is to the same effect ; and it is expressly required by the statute that the declaration shall correspond with the writ. The statute certainly does, for some reason, distinguish throughout between actions for a wrongful *taking* and detention and actions for a wrongful detention alone, and gives a form of a writ suited to each case, requiring, as I have just mentioned, that the declaration shall correspond with the writ, that is, in regard to the nature of the case stated—a direction which would seem to be idle and unmeaning, unless the proof must correspond with the declaration. The defendants, on this ground, argue, that when the plaintiffs, have declared for both injuries—that is, taking and detaining—prove only a wrongful detaining, as in this case, they must fail. But, whatever may have been the object in giving, as it were, a distinct form of action for detaining only—and I confess I do not perceive the reason, (for it cannot be from the necessity of suiting the writ to the affidavit required, because that applies only to the interest of the plaintiffs in the goods, and to their value)—I do not see how we can deny to either party the right of receiving such a verdict upon the issues which have been raised on the record as the evidence entitles them to.

The verdict should be entered for the defendants on the first plea, and for the plaintiffs on the other, which latter finding, I apprehend, must entitle the plaintiffs to judgment in their

favour. It might be contended that such effect should be given to the principle frequently laid down, that every unlawful detention is a new taking, as to entitle the plaintiff to judgment upon both issues. It is not upon this rule for nonsuit that that question can be properly determined, for the plaintiffs are clearly entitled, we think, to enter judgment upon the verdict in their favour upon the second plea, and cannot be nonsuited when they have succeeded upon that part of their case which entitles them to a return of the goods. If the plaintiffs, having succeeded in establishing a wrongful detention, should, as of course, have a verdict entered for them on the issue upon the plea of *non cepit*, their course would be to apply to the judge who tried the cause. This, however, is an application from the other side for a nonsuit, which, I think, must be discharged; and the case of *Evans v. Elliott* (5 A. & E. 142), apart from our statute, would seem to establish that the whole declaration here was proved.

DRAPER, J.—The declaration in this case is for *taking* and *unjustly detaining*. Our statute gives the action of replevin when goods are *wrongfully taken* or *wrongfully detained*. In the manner in which the declaration is framed, is the taking complained of as a substantial injury, or is it stated as a mere inducement to the real ground of action which follows, namely, “unjustly,” which means wrongfully, detaining? I think we may well say, with Lord Denman, in *Evans v. Elliot* (5 A. & E. 142), that the objection of the defendant is very critical. “Every unlawful detention is a taking;” and it appears to me that the plaintiff, using the word “taking” without adding “wrongfully,” meant to charge no other taking than that which is involved in, and is proved by, the wrongfully detention; which latter is shewn on the evidence to constitute the plaintiffs’ sole ground of action. If the declaration had charged a taking and detaining only without stating either to be done wrongfully, would it have been good against an objection based on the omission? I think not, and I am by that conclusion strengthened in my view of the present case. I incline to treat the plea of *non cepit* to this declaration as an immaterial traverse. It is true

the statute gives precisely the form of writ, which I assume was used in this case, as the declaration is said to correspond with it; but the statute, before giving the form of writ, expressly provides that it shall be framed so as to suit the particular case, and therefore the particular form given must be used in reference and subservient to the enactment prescribing for what the action of replevin will lie; and when the statute enacts that it shall lie for a *wrongful* taking, or for a wrongful detention, I think the injury sued for must be described in the words of the statute in framing the writ for that injury, and that a writ and declaration complaining of a taking and detention only—omitting to charge either as wrongful or unjust, (which is used synonymously in the form of writ given) would not be upheld.

In my opinion, therefore, the plaintiffs are entitled to succeed on these pleadings and the finding of the jury—although a verdict on *non cepit* is given for the defendants.

BURNS, J., concurred.

Rule discharged.

THOMPSON V. COTTERELL.

Promissory note—Error in notice of non-payment—Subsequent promise to pay.

A notice of non-payment of a note, received by defendant, the first of four endorsers, stated the date and parties correctly, but described it as for £28, instead of £25. It was shewn that, after the notice, the defendant had promised to pay. The learned judge of the county court directed the jury that the notice was insufficient, and that the subsequent promise to pay could not avail, as it was not averred in the declaration.

Held, a misdirection on both points.

APPEAL from the County Court of the county of Middlesex.

The defendant was sued as endorser of a promissory note for £25, made on the 30th of November, A.D. 1852; and pleaded—1st, That he did not endorse. 2ndly, That he had no notice of non-payment by the maker.

At the trial the indorsement was proved. As to the notice of non-payment, a protest was put in, made by a notary public of Upper Canada, that on the 3rd of March, on the day the note fell due, he presented it and payment was refused, because of no funds; and that, on the 4th of March he gave written notice to each of the indorsers, through the

post—enumerating the endorsers and stating how the several notices were addressed.

The notice so sent was produced on the defendant's part at the trial, dated 3rd of March. It described the note correctly by its date, and stated who was the maker and the names of the four endorsers on the note, this defendant being the first endorser; but it stated the note to be one for £28, instead of £25, which was no doubt meant. There was strong evidence of the defendant having, not long before this action was brought, promised to pay the note, though he must then have been aware of the contents of the notice he had received.

The learned judge of the county court considered that notice of non-payment was not proved to have been given, in consequence of the error in stating the amount of the note; and that the subsequent promise to pay could not avail because it was not averred in the declaration. A verdict was therefore given for the defendant.

C. Jones obtained a rule nisi (granted under the statute by a judge in chambers in vacation) to set aside the verdict, and for a new trial on the law and evidence, and for misdirection: to which, in this term, *J. Duggan* shewed cause.

C. Jones, contra, cited *Mellersh v. Rippen*, 16 Jur. 366; *S. C.* 7 Ex. 578; *Nias v. Nicholson*, 2 C. & P. 120; *Lundie v. Robertson*, 7 East. 232; *Potter v. Rayworth*, 13 East. 417.

ROBINSON, C. J.—The learned judge of the county court, I apprehend, fell into an error on both points. The slip in the notice of calling the note a note for £28, when in fact it was for £25, was not, in my opinion, inevitably fatal. It might have been left to the jury to say whether the defendant was likely to be misled by it, or whether the notice did not sufficiently give him to understand what note was referred to. The date and all the parties to the note were correctly described. It was hardly probable that the defendant could be in any doubt what note was meant, for it is not likely that he had endorsed two notes, one for £25 and another for £28, dated on the same day, and made by the same party in favor of the same payee, payable at the same time and

endorsed by the same parties. But there was, besides, the promise to pay after the time for giving notice had expired which would clearly put an end to all difficulty: and we have several times determined upon clear authority that there need be no averment of such subsequent promise in the declaration.

Any circumstances relied upon as dispensing with notice must be set forth in the declaration, but not a promise to pay, for that operates in the plaintiff's favor by affording the presumption that notice has been actually given.

DRAPER, J.—As to the ground on which the jury were directed to find for defendant, I am clearly of opinion there was a miscarriage. The principle "*de non apparentibus*," &c., should have been applied to this case. Only one note was shewn to exist; no presumption arose that there was any other; and if so, notwithstanding the misdescription in one particular, there was quite enough to give the defendant notice of non-payment, and of his being looked to for payment of the note sued on.—*Mellersh v. Rippen* (7 Ex. 578), *Stockman v. Parr* (11 M. & W. 809), and *Shelton v. Braithwaite* (7 M. & W. 436), are clear authorities in the plaintiff's favor.

BURNS, J., concurred.

Rule absolute.

MCCORMICK V. McRAE.

Bond—Condition.

The defendant gave to the plaintiff a bond, conditioned *not to alter his will* by which, as recited in the bond, he had devised to the plaintiff certain land. He afterwards sold and conveyed the land to one C.
Held, that the condition was broken.

The plaintiff sued the defendant in debt, on a bond made on the 19th of March, 1851, in the penalty of £150.

The condition of the bond was set out in the count and was to this effect: After reciting that Donald McRae, the defendant, was the owner of lot number twelve in the first concession of the township of Lochiel, and that he had willed the said lot to John McCormick, this plaintiff, the condition was, that "if the said Donald McRae would not alter the said will," then the said writing obligatory shall be null and

void, otherwise to remain in full force ;—and the breach was, that after the making of the bond, to wit, on the 1st day of June, 1852, the defendant did alter the said will, contrary to the form and effect of the said writing obligatory and the condition thereof.

The defendant pleaded that he did not alter his said will, in manner and form, &c.

At the trial at Cornwall, before Robinson, C. J., the will was produced and proved. It was dated on the same day as the bond, the 19th of March, 1851. It devised to Catharine, the testator's eldest daughter, twenty acres of the east half of the lot number twelve mentioned in the bond ; and that after her death those twenty acres which were described should be inherited by his son-in-law, John McCormick (the now plaintiff,) his heirs and assigns for ever.

Then he devised to his son-in-law, the present plaintiff, and to his wife Nancy, and to their heirs and assigns, the east half of the said lot number twelve, excepting the twenty acres devised to his daughter Catharine, "which after her death are to be inherited by McCormick, or his devisee." He further left to McCormick all his claims and title to the west half of the said lot number twelve.

The plaintiff, McCormick, had been living on the lot twelve with his father-in-law, the defendant, for some time before the will and bond were executed. He had been altogether nine or ten years on the place. On the 1st of June, 1852, the defendant made a conveyance of the east half of lot number twelve to one Chisholm, for a consideration of £60, acknowledged to be received, with covenants for title and for further assurance ; and under this title an ejectment was brought by Chisholm, and a verdict recovered and this plaintiff was compelled to leave the premises.

It was not proved whether the plaintiff had given any consideration to the defendant for devising the land to him, or that he was to give any thing for it. Nor was it shewn what led to the defendant conveying away the land to Chisholm, any further than that the defendant had been heard to complain that McCormick "had turned against him, so that the defendant could not live with him ;" from

which it seemed probable that the devise was made upon some understanding that McCormick was to support or assist the plaintiff; but that is only conjecture. Nothing of the kind was proved, and the witnesses who were examined declared that they had no knowledge of what was the motive to the devise in the plaintiff's favor. It was sworn that the defendant had no title to the west half of the lot, and had not made a conveyance of it to any one. The east half was sworn to be worth about £100.

The learned Chief Justice told the jury that the only issue was, whether the defendant had altered his will or not, and that he considered it proved that he had done so, for that by conveying the estate to Chisholm he had taken it out of his will—in other words, had revoked his will as to the east half of the lot—and so had in fact altered this will, by which he had devised it to the plaintiff. He remarked that regard must be had to the obvious meaning of the bond, and that the condition did not mean only that the defendant was to make no other will.

He left the question of damages to the jury, with particular observations upon the unsatisfactory nature of the case, from the total absence of evidence explaining the nature of the transaction—whether the devise was in the first instance a free gift, or made upon some consideration which the plaintiff had failed in performing.

He told them that the case might be such as to make it reasonable to give damages to the value of the land or damages little more than nominal, according to circumstances which were not shewn.

A verdict was given for the plaintiff, and £100 damages.

Richards moved for a new trial on the law and evidence, and for the reception of improper evidence, and for excessive damages, or to arrest the judgment.

Vankoughnet, Q.C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We have no doubt that the condition of this bond, though certainly a singular one, is not insensible or illegal; and that the conveyance by the obligor, after he gave the bond,

was a breach of the condition, for it took the estate out of his will, and altered his will as to that. The only difficulty we have is, in reconciling ourselves to the damages, for there really was none of that evidence given which might have assisted the jury in determining what damage the plaintiff had actually suffered. The land, which the defendant had in effect bound himself that the plaintiff should take under his will, was sworn by one witness to be worth £100; and I suppose the jury, in the absence of all such testimony as could lead them to discriminate upon any particular ground caught at them as a guide to the damages. It might be just to give that, or more just to give much less, according to circumstances which were kept out of view, though the defendant must have been as well able as the plaintiff to have proved what the circumstances were. It is to be considered that the will would at any rate have given no title to the plaintiff till after the devisor's death; and in estimating the value of the land to the plaintiff, the fact that there was this life interest to intervene might reasonably have been allowed to occasion some abatement. On the other hand, the plaintiff, it is clear, had been many years in actual possession when the defendant, contrary to his bond, alienated the land, and enabled a stranger to evict the plaintiff, as he had done. It may well have seemed to the jury that the bond was entered into for the purpose in fact of assuring to the plaintiff an uninterrupted enjoyment of a possession which he already held.

One can suppose a state of things existing between these parties which would shew this verdict to be a just one, or one that would shew it to be very clearly otherwise; but it may be reasonable enough. We have no ground laid before us for holding it to be certainly excessive. We could only grant a new trial on payment of costs, and for anything we can see that might in the end be an injury to the defendant.

We therefore think it right to discharge the rule.

Rule discharged.

ARNOLD V. HIGGINS.

Replevin for goods seized under legal process—14 & 15 Vic. ch. 64—Commission to examine witness.

Goods seized under an attachment from the Division Court may be replevied by a third party claiming them as his own.

A material witness for the plaintiff, being present during the assizes, stated that he was obliged to go to the United States, on business; and on affidavit of this fact a commission was applied for, and granted, and the witness examined; the defendant's counsel objected to the issuing of the commission, and refused to cross examine, as he had no opportunity of consulting with his client, but he attended at the trial, and made the best defence he could.

It being very important, under the circumstances of the case, that this witness should be subjected to a cross-examination, the court granted a new trial on payment of costs.

REPLEVIN. Pleas—1. *Non cepit*. 2. That the goods, at the said time when, &c., were the property of one Brunn and not of the plaintiff.

3. A special plea of justification, in which the defendant avowed the taking as a bailiff, of a division court, under an attachment issued on the 10th of April, 1852, at the suit of one McGee against the goods of Alexander Brunn, an absconding debtor.

The plaintiff replied to the second and third pleas, that at the time of the seizure the goods were the goods and chattels of him the plaintiff.

At the trial at Toronto, before McLean, J., it was proved that the attachment issued on the 10th of April, 1852 from the division court was upon a promissory note of Brunn for £19 17s 6d.; that it was delivered on the same day to the defendant, the bailiff of the division court, who also, on the same day, attached a carriage called an omnibus, then being in Toronto. Brunn had been in Hamilton in 1851, using this omnibus for some time, and at length returned to Rochester, leaving the omnibus behind him in the possession of one McKay; and this attachment was sued out against him as an absconding debtor. In February, 1852, after Brunn returned to Rochester, he and his wife signed a paper, professing thereby to have received on that day from the plaintiff in this action three hundred and fifty dollars for an omnibus to be delivered at McKay's hotel in Hamilton, "the same

being sold by me," (the paper said,) "by power of attorney from G. W. Miller, of Rochester." The evidence was such as to lead strongly to the conviction that this was a mere colorable transfer; that a pretence had been set up that the omnibus belonged to Mrs. Brunn when in fact it was her husband's, and that the object was to cover it from his creditors. It was admitted that the plaintiff had really paid nothing when the writing was signed, but that he undertook merely to board Brunn, and his family until his charges should amount to three hundred and fifty dollars.

Miller, who had held, or pretended to hold, the omnibus on behalf of the wife of Brunn, resided usually in Rochester, but in January last was present in Toronto. The assizes commenced on the 6th of January; and on the 11th of January a judge's summons issued at the instance of the plaintiff in this cause, calling on the defendant to shew cause why Miller should not be examined upon interrogatories, *he being about to leave Upper Canada*. The defendant's attorney resisted this, but the order was made; and on the 12th of January Miller was examined on commission or interrogatories in chief administered on the part of the plaintiff, the defendant's attorney declining to cross-examine, not having an opportunity, as he declared, of referring to his client for instructions, and protesting against such an examination taking place on a commission suddenly issued during the assizes to examine a witness who was then present in the country, and who would by this means evade a cross-examination in open court; the attaching creditor, McGee, who was the party really interested in the defence, being at the time absent from this province.

Issue had been joined in the cause on the 2nd of October, so that there was ample time for the plaintiff to have taken out a commission in the usual form to examine Miller at Rochester, when, according to the practice, the opposite party would have had time deliberately to frame and propose cross interrogatories after inquiring into the facts. Instead of taking out a commission, the plaintiff's attorney procured Miller to attend in Toronto, when, after remaining a few days, he stated (as it appeared) that professional business

required him to return to Rochester; and on an affidavit to that effect, the plaintiff applied for a commission on the 11th of January, which issued on the 12th, and the witness was examined on the same day.

At the conclusion of the evidence the defendant's counsel moved for a nonsuit, on the ground that the defendant, as bailiff, was entitled to notice of action under 13 & 14 Vic. ch. 53, sec. 107; but the learned judge held that this case did not come within the act, being an action of replevin to try the right, and not substantially of trespass for the "*act done*."

Hallinan obtained a rule nisi for a new trial on the law and evidence: on the ground that upon the facts proved the goods were not repleviable, being at the time in the custody of the law; and on account of the reception of improper evidence; and on affidavits shewing a surprise on defendant. He cited *Pearson v. Roberts*, Willes 672; *George v. Chambers*, 11 M. & W. 149.

Dempsey shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

Judging of the merits of this case from the report of the evidence, we are strongly impressed with the opinion that a verdict in favor of the defendant upon the issue on the plea which denied that the goods belonged to the plaintiff, would have been the more correct finding. We do not think that the plaintiff was under any difficulty on account of his not having given notice of action to the defendant, a bailiff in the division court, for we have already decided that the action of replevin may be brought without such notice in those cases in which the defendant, if sued in trespass, would be entitled to notice (*a*); for replevin is not properly an action for any act done, but a remedy for trying the right of property; and the object of notice, which is to give an opportunity for tendering amends, does not apply in replevin.

But in addition to the weight of evidence tending strongly to throw suspicion upon the title of the plaintiff, derived through Brunn and his wife, it seems to us that the examin-

(a) See *Folger v. Minton*, 10 U. C. R. 423.

ation of Miller upon commission, under the circumstances, and upon so short a notice, was not a proceeding that gave the defendant a fair chance of meeting the plaintiff's case, and on that account we think the defendant should have a new trial on payment of costs.

The question whether the goods were, under the circumstances, replevisable, does not directly present itself upon the pleadings—though, if we thought they were clearly not so, that might furnish an additional reason for granting relief to the defendant upon the other grounds; but upon the best consideration we can give to that question, we do not think the plaintiff's action was liable to exception on the ground that the goods, not being in the custody of the law, could not be replevied.

The late case of *George v. Chambers* (11 M. & W. 149) shews a strong inclination in the judges at the present day to hold that the remedy will lie where the goods have been seized, not under the process of any superior court, but under a warrant of distress following a summary conviction, or under process from any inferior court; and more especially where the action is brought, as in this case, not by the person against whom the process is, but by a stranger who sues upon the very ground that the goods seized were his goods, and not the property of him against whom the writ or warrant issued.

And the difficulty of holding that, in such a case, the goods seized, not in obedience to, but against the command of the writ, cannot be replevied, is very much increased by our late statute 14 & 15 Vic. ch. 64, which provides that wherever goods shall be wrongfully distrained, or otherwise wrongfully taken, or shall be wrongfully detained, the owner or person who by law can maintain trespass or trover for personal property, *shall have and may bring* an action of replevin for the recovery of such goods, in like manner as actions are brought and maintained "by any person complaining of an unlawful distress." A person to whom an execution or warrant of distress has been directed may possibly, in some case, act oppressively, and in wanton disregard of the apparent right of property of a third party, and upon a mere groundless surmise that the goods which are in his

possession are not owned by him, but are the property of the person named in the writ or warrant, and may persist, in the face of all claims and remonstrances, in seizing and selling them. However improbable that may be, we must admit it to be possible; and in any such case the property so wrongfully seized might from particular circumstances have a value in the mind of its owner far beyond its intrinsic value, so that any damages which a jury could conscientiously give would form a very inadequate recompense for the wrong. In any possible case of that kind we do not see how we could tell the party injured, in the face of our statute, which is so imperative and plain in its language as the one to which we have referred, that he has not a specific remedy for regaining the article itself. We must, we think, hold that upon the plain words of the statute he has such a remedy, and that he need not submit to the inevitable loss of his goods. The legislature seems to have intended nothing less; they have made no exception as to goods wrongfully seized under color of process. We must not stop short in the remedy which they have given in very plain words, but are bound to carry their act into effect; and even if some inconvenience were to be apprehended from giving effect to the statute in such cases as the present, we must leave it to the legislature to consider these hereafter, and guard against them as they can, by modifying their statute; we cannot in the meantime decline to carry it into effect.

We all agree in this opinion, and therefore, in disposing of this rule nisi for a new trial, moved on the part of the defendant, we cannot be influenced in the defendant's favor by the ground which he has taken, that the goods, having been taken under an attachment from the division court, were in custody of the law, and therefore not replevisable, for we think that a stranger whose goods have been wrongfully taken under such attachment may have replevin under our statute. But on the other grounds on which the rule was moved, we are disposed, as we have already stated, to grant a new trial. The claim set up by the plaintiff to the chattel in question is attended with strong circumstances of suspicion. The defendant is an officer of justice, who has acted, as we

must assume, in good faith, intending nothing more than to discharge a responsible public duty according to the best of his judgment. The person on whose behalf he acted may or may not have indemnified him. All that we hear of him is, that he is stated to have been absent from the country at the time of the trial. The person on whose testimony the claim of the plaintiff in this case principally, if not wholly, rested, was Miller, the attorney who assumed to act as the agent of the party from whom the plaintiff derives his claim. He must be supposed to know more of the truth of Mrs. Brunn's claim than any one else who was examined; and whether he acted honestly and in good faith, or was helping on a fraud by the arrangement which he took upon him to make, was the question to be inquired into. It was necessary to the satisfactory determination of the case that he should have been subjected to a searching cross-examination, with due opportunity for preparation on the other side. It is due, we think, to a public officer, when he has himself been guilty of no laches, that he should have a reasonable opportunity of making his defence. The course that was taken, of allowing him to return to the United States after he had attended at the assizes, and before the cause came on, and thus withdraw from a *vivâ voce* cross-examination, was an unfortunate course, we think, particularly as the circumstances did not admit of that deliberate cross-examination which might have taken place if the witness had been examined at his foreign place of residence, upon a commission taken out in the usual course a convenient time before the assizes. The affidavits are very strong to support the application for a new trial on this ground. It is true that the defendant's counsel, when he failed in his opposition to the course taken, made the best defence he could at the trial; but we do not think that by doing so, under such circumstances, he compromised his right to relief by a new trial. As the courts in England have observed in similar cases, he was in difficulty, and obliged to defend himself as well as he could under the circumstances. He could not certainly tell what the court in their discretion might afterwards do for his relief. He was not in the same position as a defendant voluntarily going into his case without pressing

some objection on the ground of irregularity, which the court would not afterwards allow him to take advantage of.

We therefore think it right to grant a new trial on payment of costs.

Rule absolute.

GILCHRIST V. CONGER.

14 & 15 Vic. ch. 64—*Replevin*—*Writ directed to coroners.*

Where the sheriff is defendant, a writ of replevin under 14 & 15 Vic. ch. 64, may be directed to the coroners, though the statute does not provide for such a case.

An objection that there was in fact no taking or detention cannot be urged as a ground for setting aside the writ, but must be decided at the trial.

Leith obtained a rule nisi on the plaintiff, to shew cause why the writ of replevin issued in this cause, and all proceedings thereon, should not be set aside as irregular, with costs, on the ground that the writ was directed to coroners, and that it was improperly issued against the defendant, he having acted in the matter as complained of in his capacity of sheriff, and there having been moreover in reality no actual taking of possession or detention by him.

The writ was directed to the Coroners of the United Counties of Peterborough and Victoria, and directed them to replevy to this plaintiff certain specified quantities of timber, alleged to be of the value of £239, which the defendant, sheriff of the said united counties, had taken and unjustly detained (following the ordinary form of the writ).

The defendant, in an affidavit filed in support of this application, made oath that the timber therein mentioned to be taken and detained by him had never been removed or detained in any way by him: that a short time before this writ issued he received a writ of *pluries fi. fa.* in a suit of *Shortt v. Scott*, by which he was commanded, as sheriff, to levy a certain sum of money out of the goods of Scott: that he did thereupon cause the goods of Scott to be levied on, by having an inventory of them made, and the goods advertised for sale: that at the time of such levying and advertising, the goods were not in the actual visible apparent possession of any one: that they were not removed or detained in any way by him: that a short time before the levy the goods were in the actual possession of Scott: and that afterwards,

finding the plaintiff claimed the goods, he abandoned the levy, and did not sell or offer for sale the said goods and chattels.

Weller shewed cause, and cited *Gilb. on Replevin*, 138, 141; *Willes*, 632; 3 *Kent Com.* 484, notes; *George v. Chambers*, 11 M. & W. 149; *Sewell on Coroner*, 23, 207; *Jones v. Johnson*, 5 Ex. 862; *Allen v. Sharp*, 2 Ex. 352; 2 *Geo. IV. ch. 19*, sec. 1.

Leith, contra, 2 *Lutw.* 1191, cited *Gilbert on Distress*, 115, 130, 138, 161; *Co. Lit.* 145; *Foster v. Miller*, 5 U. C. R. 509; 1 *Sch. & Lef.* 324.

ROBINSON, C. J.—Upon the first ground—that the writ is illegal, being without authority directed to coroners, whereas our statute 14 & 15 Vic. ch. 64 requires that it should be directed to the sheriff—we are of opinion that we cannot give way to the objection. It is manifest that the writ could not properly be directed to the sheriff when the remedy sought is against himself; and the only question is, whether there must be a failure of justice because the statute does not in terms provide for such a case.

We think not. The subject is extensively discussed in the case of *Wimbish v. Willoughby* (*Plow.* 73), and in the 17th chapter of the old treatise, by *Umfreville*, on the office of coroner S. 1, and it is laid down that, “in case of process to coroners, upon any disability in the sheriff, the sheriff is no longer considered as an officer of the court in that suit wherein the process to the coroners is awarded, nor should he afterwards intrude, act, or intermeddle in that cause;” and that “the coroners in that case are in all respects considered as immediate officers of the court *in loco vice-comitis*, and may do all such lawful acts as the sheriff himself might have done, if not under any challenge or incapacity,” and this as well in regard to judicial as other process.

In *Comyn's Digest*, “Officer” G. 13, it is said, without any qualification or exception, “Process shall be directed to the coroners where the sheriff is a party plaintiff or defendant.” Wherever therefore our replevin act speaks of the sheriff as the officer to whom the writ is to be directed, and who is to take security, it must, we think, be taken to be said

with the reservation of that exception, which is universal, that he is not a party interested in the suit or proceeding.

The second objection, that there can be no replevin where the sheriff has taken or detained the goods in his official capacity as sheriff, is rather removed than supported by the sheriff's own affidavit, for he swears that he neither took nor detained the goods, but had only an inventory made of them and advertised them for sale, but never took them into his possession, nor otherwise meddled with them, and so could not be chargeable either as sheriff or otherwise. If this was not so, however, we should not determine summarily upon an application of this kind that there can be no replevy had against a sheriff by a stranger, whose goods he has wrongfully seized under an execution against another party, because it is at present our impression that the effect of our statute 14 & 15 Vic. ch. 64 is to give the remedy in such a case, as we have stated in the judgment delivered this day in the case of *Arnold v. Higgins* (a).

The last objection is one which does not form a ground for setting aside the writ—namely, that the defendant never did in fact either take or detain the goods; that involves the merits of the case, and must be left to be ascertained upon the trial.

DRAPER, J.—In these and numerous similar instances, where a right, remedy or proceeding, of general application to suitors is given, though the sheriff is mentioned through whose instrumentality the object is to be attained, where the sheriff is a party seeking the remedy, or against whom it is sought, the act must be done by the coroner, to prevent a failure of justice. Why should not the same rule govern this case?

It is a well known rule of construction, that a remedial statute shall be extended by equity to other persons besides those expressly named; of which instances are given in *Dwarris*, 721. Thus the act 1 R. II. ch. 12, which ordains that the wardens of the fleet shall not permit prisoners in execution to go out of the prison by bail or baston, has been adjudged to extend to all gaolers. So the remedy given by

(a) Ante page, 191.

9 Edw. III. ch. 3, against executors, has been extended to administrators. So, though the clause of 27 Geo. II. ch. 17, requiring the residence of the marshal of the Q. B. prison did not in terms extend to the other officers, yet it was held that the legislature intended to require the personal residence of these officers—5 T. R. 509. See also 1 Rep. 131.

It is commonly said that replevin will not lie for goods taken in execution; but this applies to cases in which the execution debtor seeks the remedy. "The taking of goods of a stranger is a trespass, and replevin lies when goods are tortiously taken, and therefore goods taken in execution may be replevied by a stranger to it."—3 Kent's Com. 484, note. *Winnard v. Foster* (2 Lutw. 1191) is cited, and *Rooke's case* (5 Co. 99), where replevin was brought for goods seized as a distress for non-payment of an assessment imposed by authority of a commission of sewers.

The late act 16 Vic. c. 175, s. 13 (a), favors this construction.

BURNS, J., concurred.

Rule discharged.

TORRANCE V. MCPHERSON.

Appeal—Notice not complying with 27th rule, effect of.

The defendants, appealing from a decision refusing a new trial, in their notice under the 27th appeal rule, merely stated generally that the judgment was erroneous, as being against law and evidence, and because the jury were misdirected.

The court held this not a compliance with the rule, and ordered that execution might issue. *Quære*, however, whether such order was necessary, as the notice not being in accordance with the rule could not take effect as a supersedeas.

The plaintiff brought a special action on the case against the defendants, for a loss sustained from a collision between a steamer owned by the defendants and another owned by the plaintiffs. The defendants had pleaded several pleas denying the liability on various grounds, and it was agreed at the trial that if the plaintiffs should receive a verdict which should be upheld by the court, the amount of damages should be afterwards settled by the award of gentlemen then named by the

(a) This section enacts that mileage on service of writs shall be allowed only when service is made "by the sheriff, his deputy or bailiff, being a literate person (or by a coroner, when the sheriff is a party to a suit)," &c.

parties. Upon the evidence and the charge which they received the jury found for the plaintiffs.

In the following term the defendants moved for a new trial on the law and evidence, and for misdirection, and upon affidavits. A rule nisi was granted, and after argument the court discharged it.

On the 8th of December, 1852, after Michaelmas term last, the defendants, intending, as it would appear, to avail themselves of the 14th rule, made on the 3rd of July, 1850, respecting appeals, and to take the opinion of the higher court upon some one or more questions of law not appearing upon the record, served notice of appeal within three months, and afterwards, on the 1st of June last, served the following notice of their reasons of appeal:—

“The following are some of the grounds of appeal against the judgment discharging the rule nisi for a new trial:—

1st. That the judgment was erroneous, inasmuch as the verdict rendered for the plaintiffs on the trial was against law and evidence, and on that ground a new trial should have been granted by the court.

2nd. “That the judgment was erroneous, inasmuch as the Chief Justice, who tried the cause, misdirected the jury therein, in a matter of law affecting the questions at issue in the said trial.”

Galt moved to be permitted to take out execution notwithstanding the defendants had appealed, on the ground that this was not sufficient compliance with the 27th of the appeal rules which provides “that no writ of appeal shall be a supersedeas of execution until service of the notice of the allowance thereof, containing a statement of some particular ground of appeal intended to be argued; provided, that if the error stated in such notice shall appear to be frivolous, the court or a judge, upon summons and proof of the service thereof by affidavit, may order execution to issue.”

Vankoughnet, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We are quite clear that this is in truth no compliance with the rule. It amounts to nothing more than the general

assignment of errors, that judgment was given for the plaintiffs when it ought to have been given for the defendants. In fact there is no statement in the notice of any "*particular ground* of appeal intended to be argued," and we do not see that it was necessary for the plaintiff to have come to the court for leave to sue out execution, for there has not been any such notice served as can give to the appeal the effect of a supersedeas. The plain meaning of this rule is, that when the notice does contain some particular ground of appeal, but such only as the other party contends is manifestly frivolous, he shall not take upon himself to determine the question of its utter insufficiency, but must apply to the court and let them pronounce upon it. In moving the court, however, the plaintiffs have taken their safer course, and were probably led to it from the circumstances of the rule limiting no time within which the grounds must be stated.

The 27th rule is a literal transcript of the English rule of Trinity Term, 4 Wm. IV., for restraining frivolous writs of error, and the few cases which have arisen under that rule shew that it is quite impossible that this notice can be treated as a compliance with the rule.

Ordered, that execution might issue.

MELVILLE ET AL V. CARPENTER.

Venire de novo.

Where the plaintiff had a general verdict in an action of debt on several counts, and the defendant succeeded on a demurrer to a plea to the first count, a *venire de novo* was awarded.

DEBT on common counts.

The first count stated that the defendant, on the 1st of November, 1852, was indebted to the plaintiffs in £200, for work and labour, and materials found. The second count was on account stated of moneys due, upon which the defendant was found to be in arrear in £200.

Pleas—1. Never indebted. 2. Payment. 3. Set off.

There was a fourth plea as to £132 6s. 7d., part of the moneys claimed in the first count, which was demurred to, and abandoned by the defendant; and a fifth plea to the

whole of the first count, which was demurred to, and on which the defendant had judgment.

At the trial a general verdict was given for the plaintiffs, and damages assessed at £179 2s. 2d. On giving judgment for the defendant on demurrer, leave was reserved to the plaintiffs to move within a certain time to withdraw their demurrer, and take issue on the last plea. Such an application was made, and proceedings were stayed by Burns, J., on the 13th of July 1863, until the next term.

Springer now moved for a *venire de novo*, filing an affidavit of the plaintiffs' attorney, in which it was stated that judgment in the defendant's favour on the fifth plea was given, after contingent damages assessed on demurrer, and, after trial of the issues in fact; that a new trial was applied for by the defendant, but refused; that he believed the fifth plea to be a mere sham plea, pleaded to entrap the plaintiff.

Eccles shewed cause.

M. C. Cameron, in support of the rule, cited *Corner v. Shew*, 4 M. & W. 163; *Lewis v. Edwards*, 9 M. & W. 720; *Emblin v. Dartnell*, 12 M. & W. 830; *Ayrey v. Fearnside*, 4 M. & W. 168; *Gould v. Oliver*, 2 M. & G. 238; *Empson v. Griffin*, 11 A. & E. 187; *Dadd v. Crease*, 2 Cr. & M. 223; *Leach v. Thomas*, 2 M. & W. 427.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that we are bound to make this rule absolute. We have no discretion to decline granting a *venire de novo* whenever there is in fact a proper occasion for it, for the refusal would be a ground of error.

Now here the plaintiff has a general verdict in an action for debt upon several counts, and the defendant has succeeded upon an issue of law raised upon a plea to the first count, which has been thus adjudged to be a good bar to a recovery upon that count. If that count were plainly a bad count, a *venire de novo* must necessarily be awarded, if the defendant took exception; and it can make no difference whether the plaintiffs are disabled from recovering upon one count of their declaration, because it is legally insufficient, and so can not sustain a verdict, or because it has been well answered

by a defence admitted to be true and adjudged to be sufficient. The case of *Lewin v. Edwards* (9 M. & W. 720), cited by Mr. Cameron in the argument, is quite in point as to the principle.

Rule absolute.

JONES V. MARSHALL.

42 Eliz. ch. 6—*Costs*.

Declaration for trespass and false imprisonment averred that the defendant assaulted the plaintiff, and seized and laid hold of him, and pulled and dragged him about, and forced and compelled him to go from a certain dwelling-house to the common gaol, and there imprisoned the plaintiff, and detained him in prison, &c.

The defendant pleaded—first, not guilty, and secondly, thirdly, and fourthly, *as to the assaulting the plaintiff, and keeping and detaining him in prison*, special pleas of justification under writs of *ca. sa.* and *ca. re.* The rejoinders to the replications to the second and third pleas were demurred to. A verdict was given for the plaintiff, and contingent damages assessed at 12s. 6d.

Held, that a battery was not admitted on the pleadings, and therefore that a certificate might be granted under 42 Eliz. ch. 6, to deprive the plaintiff of costs.

This was an action for trespass and false imprisonment. The declaration averred in the usual form that the defendant assaulted the plaintiff, and *seized and laid hold of him*, and *pulled and dragged him about*, *forced and compelled him* to go from a certain dwelling-house into divers public streets and highways to the common gaol of the united counties of Northumberland and Durham at Cobourg, and there imprisoned the plaintiff and detained him in prison, without any reasonable or probable cause, for a long time, to wit, &c., whereby the plaintiff was then not only greatly hurt, bruised, and wounded, but was greatly injured in his credit, &c.

Pleas—1. Not guilty.

2. *As to the assaulting the plaintiff*, and keeping and detaining him in prison, the defendant justified under a writ of *ca. sa.* against this plaintiff on a judgment obtained by the defendant in the county court.

3. To the same alleged injuries, justification under the same writ, in a different form.

4. To the same alleged injuries, the defendant pleaded a justification under a *ca. re.* from the district court, at the suit of one Hills.

To the second and third pleas the plaintiff replied that the writ was set aside for irregularity. To the fourth, admitted the writ, and replied *de injuriâ absque residuo causæ*.

The rejoinders to the replications to the second and third pleas were demurred to.

Before the demurrers were determined the cause was taken down to trial, and verdict given for the plaintiff, and contingent damages assessed at 12s. 6d.

The learned judge who tried the cause afterwards certified under the statute 43 Eliz. ch. 6. that the damages to be recovered did not amount to 40s., but only to 12s. 6d.

Eccles obtained a rule nisi to rescind the certificate. *Hector* shewed cause.

In addition to the cases cited in the judgment, *Twiggs v. Potts*, 4 Dowl. 266 ; *Cann v. Facey*, 4 A. & E. 68 ; *Richardson v. Barnes*, 4 Ex. 128 ; *Briggs v. Bowgin*, 2 Bing. 333, were referred to for the defendant : and *Johnson v. Northwood*, 7 Taunt. 689 ; *Smith v. Edge*, 6 T. R. 562 ; *Whalley v. Williamson*, 5 Bing. N. C. 200, for the plaintiff.

ROBINSON, C. J., delivered the judgment of the court.

We are applied to on the part of the plaintiff to set aside this certificate as having been illegally granted, because (it is contended) there is a battery admitted on the record, and on that account no certificate can be granted under the statute 43 Eliz. ch. 6, to deprive the plaintiff of costs ; for the words of the statute (sec. 2) are, that "if upon any action personal, not being for any title or interest of lands," &c., "*nor for any battery, it shall appear to the judge,*" &c., "that the debt or damages to be recovered therein shall not amount to the sum of forty shillings or above, in every such case the judges and justices before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less, at their discretion."

The statute is plain enough. All that is to be considered is, whether it does stand admitted upon this record that the action was in fact brought for a battery ; and that, if the case

stood wholly upon evidence given at the trial, would depend not on what the plaintiff had chosen to complain of in his declaration, but upon what the judge who tried the case found that he really had some pretence for complaining of. Of course where there is a battery admitted on the record by the defendants pleading, then it is plain enough that the action must be held to have been brought for that, and if the defendant fails in his justification of the battery, the plaintiff can be in no danger of losing his costs under this statute.

But none of the cases cited by Mr. Eccles seems to us to go the length of warranting us in holding that on the pleadings in this case a battery stands admitted. A battery is charged, no doubt; for *seizing, laying hold of, pulling and dragging about*, do in terms include the idea of battery. We must take them, if not denied, or if not explained away by the context, to mean an *adverse* laying hold of the plaintiff, according to the expression used by the court in *Rawlings v. Till* (3 M & W. 28); but the defendant in his plea clearly stops short of admitting any seizing, laying hold of, or pulling or dragging about, and confines his justification to the assaulting and imprisoning, which have been repeatedly held not to include—that is not necessarily to include a battery. The case of *Wilson and wife v. Lainson et al.* (3 Bing. N. C. 307) is an authority quite in point, and *Emmett v. Lyne* (1. N. R. 255), and *Wiffin v. Kincard*, (2 N. R. 472), fully support the opinion there expressed, that every imprisonment does not constitute a battery. Of course, we should not at any rate review the learned judge's decision in granting the certificate, upon any question that might be raised as to his having exercised his discretion soundly, for the discretion rests with him. If it had been illegally granted in a case excepted by the statute, we ought to rescind it; but that is not our opinion. The case of *Bone v. Daw et al.* (3 A. & E. 711) shews clearly the distinction between those cases in which the special pleas confess and avoid the whole charge in the declaration, or merely the assault and imprisonment.

Rule discharged with costs.

SHANK V. CATES.

Under a conveyance "to B. S. and her children for ever," there being no children at the time of the deed,—*held*, that the grantee took only a life estate.

Ejectment for land in Rainham—tried at Cayuga, before Burns, J. A verdict was taken subject to the opinion of the court on the following facts:—On the 17th of March, 1832, Adam Shank, whose title was not disputed, conveyed the land in question, by deed poll, to his sister Barbara Shank, for a consideration of £200. The deed expressed that he granted, bargained, sold, aliened, released, transferred, conveyed and confirmed unto the said "*Barbara Shank, and her children, for ever*" all and singular that certain tract, &c., "to have and to hold the same, with the appurtenances, unto the said Barbara Shank, *and her children, for ever.*"

The plaintiff was the son and heir of the grantor in this deed. The defendant was husband of Barbara Shank, the grantee, who afterwards married Isaac Cates. She died seventeen years ago, leaving her husband in possession.

Hagarty, Q. C., for the defendant, cited Cro. Eliz. 10; *Frederick v. Frederick*, Ib. 334; *Burton*, R. P. 234.

M. C. Cameron, for the plaintiff cited *Stevens v. Lawton*, Cro. Eliz. 121; *Wild's case*, 6 Rep. 16; *Oates dem. Hatterley v. Johnson*, 2 Str. 1172; *Wright dem. Allingham v. Dowley*, 2 W. Bl. 1185; Co. Lit. Lib. I. ch. 1, 9 *a* and 9 *b*.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff, as the heir of the grantor Adam Shank, is entitled to recover, there being no persons *in esse* who could take at the time of the deed as the children of the grantee. If there had been such children they would have taken jointly with the mother, though not named by their proper names. There being no proper words of inheritance such as will create a fee in a deed, the grantee Barbara Shank took only an estate for life.

Judgment for the plaintiff.

HURLEY V. McDONELL.

Lease—Construction—Ejectment—Statute of Frauds—12 Vic. ch. 71, sec. 4.

Upon the following writing, not under seal.

“Memorandum of agreement for lease,” &c.

“W.M., for the consideration hereinafter named, agrees to demise and lease to D. H. those premises,” &c., “for the period of three years certain, at ten shillings currency per day, payable monthly in advance, during said term, and with the privilege to said H. to hold the same for a further period of two years, at the same rent, payable as aforesaid. The said H. agrees to take the said premises from said M. for the price and terms aforesaid, and to pay all taxes upon the said premises. *Possession to be given whenever the first monthly payment of rent is made.*”

Held that H. could not maintain ejectment to obtain possession, for, admitting it to be a lease, it could not be regarded as being for a term not exceeding three years from the making thereof, and so by the Statute of Frauds would require to be in writing; and therefore, without doubt, by the Statute 12 Vic. ch. 71, it could for want of a seal take effect only as an agreement to let.

Quære, however, whether the writing could in any case be construed as more than an agreement for a lease.

Quære also, as to the effect of 12 Vic. ch. 71, sec. 4,—whether every lease in writing must not be under seal, though not required to be written; so that a verbal lease for a year would be good, but a written lease for the same period void, if not under seal.

EJECTMENT for a tavern known as “the Elgin House,” in the town of Dundas.

At the trial at Hamilton, before Burns, J., it appeared that, on the 18th of December 1852, the following writing was signed by both parties. It was not under seal. “Memorandum of agreement for lease,” &c. “William McDonell, of Dundas, for the consideration hereinafter named, agrees to demise and lease to Dennis Hurley those premises occupied by him as a tavern-stand in Dundas, known as ‘the Elgin House,’ together with everything appertaining thereto, and the furniture now in and belonging to the said premises, for the period of three years certain, at ten shillings currency per day, payable monthly in advance during said term, and with the privilege to said Hurley to hold the same for a further period of two years, at the same rent, payable as aforesaid.”

“The said Hurley agrees to take the said premises from said McDonell for the price and terms aforesaid, and to pay all taxes upon the said premises. *Possession to be given whenever the first monthly payment of rent is made.*”

It was sworn by the subscribing witness that it was intended to have a lease drawn, and that this memorandum

was put in writing at the plaintiff's request, in order that he might shew it to a friend.

The plaintiff afterwards went to the defendant, and offered to pay him a month's rent in advance; but the defendant refused to take the rent, or give him possession, until the plaintiff should give him security for the furniture; and in consequence the plaintiff brought this action to obtain possession as lessee.

The learned judge held, that if the writing could in its terms be looked upon as a present demise, still, for want of a seal, it could pass no interest, in consequence of our statute 12 Vic. ch. 71; and the defendant took a nonsuit, with liberty to move against it.

M. Vankoughnet obtained a rule nisi to set aside the nonsuit, and for a new trial without costs. He cited *Co. Lit* 46 b.; *Ferguson v. Cornish*, 2. Burr. 1032; *Doe Rigge v. Bell*, 5. T. R. 471. *Woodf. L. & T.* 77; *Dann v. Spurrier* 3 B. & P. 399.

Cameron, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

It is difficult to prevail upon oneself to look upon this writing as anything more than an agreement to make a lease—not because the term was not to commence until the plaintiff should pay the month's rent in advance, because a term may be made to commence upon a contingency of that kind. It is said in *Sheppard's Touchstone*, p. 273, that if A., seized of lands in fee, grant to B., that when B. shall pay to A. twenty shillings, that from thenceforth he shall hold the land for twenty-one years and after B. doth pay the twenty shillings, in this case B. shall have a good lease for twenty-one years from thenceforth." It is impossible to reconcile all the decisions upon the question, what constitutes a present demise, though there are some points that seem to be generally adhered to as sufficiently indicative of intention to make a present demise, or the contrary.

This paper is headed as a "Memorandum of agreement for lease." That alone is not conclusive against its operating as a present demise, but it is a circumstance to be considered.

Possession is not to be given immediately, but at a time which depends on the will of the person agreeing to take the lease. There are cases, however, which tend strongly to support this as a present demise, so far as regards the language merely of the writing. But then if it can be treated as an intended present demise, it would be void under the Statute of Frauds, unless in writing ; or at least could create no term, and would do no more than make the party taking possession, under a verbal agreement of that kind, a tenant at will ; for the term contemplated here is one of three years, to commence whenever thereafter the plaintiff should pay the first month's rent, at which time and not before, possession is by the agreement to be given to him. Such a lease (admitting this to be a lease) would not in our opinion, come within the exception in the second section of the Statute of Frauds in favor of leases for a term not exceeding three years from *the making thereof* and would therefore under the statute require to be in writing. It is necessary now that a writing for such purpose should be under seal, according to our statute 12 Vic. ch. 71, sec. 4 ; and for the want of a seal it has no effect, except as an agreement to let ; though, if the plaintiff had been let into possession under it, he might from payment of rent or other circumstances, have been held to be a tenant from year to year. This plaintiff has nothing on which he can maintain ejectment.

I observe a material difference between our statute 12 Vic. ch. 71, sec. 4, and the English statute 8 & 9 Vic. ch 106, sec. 3. The latter enacts that any lease *required by law to be in writing* shall be void unless made by deed, which clearly leaves it open to parties, as before to create terms by verbal agreement provided they do not exceed in duration three years from the making.

Our Statute enacts "that *no lease in writing* shall be valid as a lease unless the same shall be made by deed." This seems to make void all leases in writing as are not sealed, whether they are such as by the Statute of Frands were required to be in writing or not. The case of a verbal demise for less than three years is left untouched.

It would seem absurd to hold that a verbal lease for a year

is sufficient, but that a written lease for the same term is void unless it be sealed. Yet that would be the effect of the act receiving a construction according to its language.

This is a point of some interest upon the effect of our late statute, and I therefore mention it ; but this case does not raise such a question, because this is a letting which under the Statute of Frauds, requires to be in writing, being for more than three years from the *making*, and therefore a seal is now necessary under any construction that we could give to our statute.

Rule discharged.

BURNHAM V. DALY.

13 & 14 Vic. ch. 63—*Registry—Conveyance by execution debtor after sale, but before sheriff's deed.*

A's land was sold under an execution in 1843, but the sheriff did not execute a deed to the purchaser until 1853. In 1852 A. conveyed to one C., who conveyed to the plaintiff. The last two deeds were registered, but that from the sheriff was not.

Held, that the prior registry of the plaintiff's title could not defeat the sheriff's deed, for the lands were bound by the execution and sale and therefore out of A.'s power to convey.

EJECTMENT for part of the west half of number 20, in the seventh concession of Smith, in the county of Peterborough. The writ was tested on the 21st of December, 1852, and was addressed to Owen Daly as being in possession ; but James Daly appeared, and defended the action.

The case was tried in May, 1853, at Peterborough, before Draper, J. It was admitted by the defendant that a patent for the west half of number 20 in the 7th concession of Smith issued on the 16th of June, 1836, granting the same to Owen Daly : and the plaintiff put in two deeds, the execution whereof was admitted ; the first bore date on the 19th of February, 1852, was registered on the 29th of September, 1852, and was a deed poll from Owen Daly, whereby in consideration of a judgment which W. S. Conger had obtained against him in the county court of Peterborough, and pursuant to the requirements of the act 4 W. IV. ch. 10, he granted bargained sold, aliened, released, transferred, and conveyed to W. S. Conger all his estate, right, title, interest, use, trust, claim, and demand out of the south-east corner of the

west half of lot number 20 in the 7th concession of Smith—habendum in fee. The second deed bore date on the 29th September, 1852, and was registered on the same day and was a deed poll from W. S. Conger to the plaintiff, whereby in consideration of £5, Conger conveyed all his estate, &c., in the premises to the plaintiff habendum in fee.

On the defence it was objected that the conveyance by Owen Daly to Conger was inoperative: 1st, As a bargain and sale, for want of a pecuniary consideration; 2ndly, As a release, for want of any previous estate or interest to operate on by way of enlargement. Both objections were overruled, leave being reserved to move upon them.

The defendant then put in an exemplification of a judgment in the district court of the district of Newcastle, entered on the 7th of June, 1841, against Owen Daly, Andrew Daly, and James Daly, at the suit of the President, Directors, and Company of the Commercial Bank of the Midland District in assumpsit for £34 3s. 9d. damages and costs, on which judgment a *fi. fa.* against goods issued, tested on the 7th of June, 1841, which was returned *nulla bona*; and on the 30th of July, 1841, a *fi. fa.* against lands was issued, returnable on the 1st of September term, 1842. The defendant further put in a deed dated 28th of May, 1853, executed by the sheriff of the county of Northumberland, who was sheriff of the district of Newcastle when the judgment was recovered, and thence until the district of Victoria of which (the County of Peterborough formed part (was set off, and since that division and the doing away of districts, has been sheriff of the county of Northumberland. This deed recited the above *fi. fa.* against the land of Owen Daly, Andrew Daly, and James Daly, and that the Sheriff had seized, as their land, the west half of No 20 in the 7th concession of Smith, which was exposed to sale on the 28th of January, 1843, when £17 11s. 9d. was the highest bid; and in consideration of that sum bid by E. Perry, the sheriff conveyed all the right of Owen Daly, Andrew Daly, and James Daly, to E. Perry in fee. This deed was not registered. The defendant proved an ineffectual search for the *fi. fa.* against land in the office of the sheriff of Northumberland, and called the subscribing witness to the

sheriff's deed who proved its execution on the day it bore date. The subscribing witness to the two deeds put in by the plaintiff swore on the defence that Owen Daly was examined before judge of the County Court of the connty of Peterborough, and spoke of the sheriff's sale of his land, and objected that he had no right to convey; and the witness swore that the plaintiff was aware of the state of things when Conger obtained his deed; that Owen Daly then stated the real state of his interest in the property.

For the plaintiff it was argued that under the new Registry Act 13 & 14 Vic. ch. 63, his title was conclusive; and a verdict was directed for the plaintiff, with leave reserved to defendant to move to enter the verdict for him.

In Trinity Term the case came on for argument. *Weller* for the defendant, cited *Doe dem. Russell v. Hodgkiss*, 5 U. C. R. 348. *Adam Crooks*, contra, cited *Warburton v. Loveland ex dem. Ivie*, 2 Dow. & Cl. 480.

DRAPER, J., delivered the judgment of the court.

The case may be thus stated—Owen Daly was seized in fee. In January, 1843, the land of which he was seized was sold in execution, to satisfy a judgment against himself, the defendant James Daly and Andrew Daly. On the 28th of May, 1853, the sheriff executed a conveyance in pursuance of that sale. On the 19th of February, 1852, Owen Daly, in order to get released from custody at the suit of a creditor, and having answered interrogatories by which he disclosed the truth as regards this land, assigned all the interest and estate he had therein to that creditor in fee, who on the 29th of September, 1852, conveyed to the plaintiff. Both these deeds were registered on the 29th of September, 1852, while the deed from the sheriff was unregistered at the time of the trial. The plaintiff contends that under the Registry Act 13 & 14 Vic. ch. 63, sec. 3, the sheriff's deed is defeated. That section enacts in effect, that after the issue of letters patent granting any lot in Upper Canada, every deed, devise, or other conveyance, which shall be executed at any time after the 1st of January, 1851, whereby any land in Upper Canada may be in anywise affected in law or equity, "shall

be adjudged fraudulent and void, not only against *any subsequent purchaser* or mortgagee for valuable consideration, but also against a subsequent judgment creditor who shall have registered a certificate of his judgment, unless such memorial be registered, as by the first recited act is specified, before the registering of the memorial of the deed, devise or conveyance, or the certificate of the judgment under which such subsequent purchaser, mortgagee, or judgment creditor respectively, shall claim."

The case certainly does not come within the letter of this enactment, for instead of the sheriff's deed—which it is sought to avoid, as against a *subsequent* conveyance which has been first registered—being first in point of execution, it is in reality the subsequent conveyance; and if Owen Daly's deed of February, 1852, can be operative at all to pass the estate, it must be so independently of any question arising on a strict construction of this section.

The real question is, whether a deed by a judgment debtor of his lands which have been taken and sold in execution executed and registered after such sale, but before the execution of the sheriff's deed in fulfilment thereof can avoid the sale in execution and the sheriff's deed.

The moment the question is thus stated it affords its own answer, for although notwithstanding the seizure and sale, the lands would remain in the execution debtor until assignment by the deed of the sheriff, yet the cases of *Doe Tiffany v. Miller* (6 U. C. R. 426, 10 U. C. R. 65), and *Doe Springer v. Miller* (10 U. C. R. 57) establish that the sheriff's deed will have relation back to the time of sale, notwithstanding the interval of many years between the two, and although the sheriff who commenced the execution had gone out of office not only before the execution of the deed but before the sale itself. The sheriff in making the conveyance, as is said in one of those cases, is to be regarded as executing a power; and where no adverse rights have been acquired by third parties, either by lapse of time or by statute, that power may be executed at any distance of time. In this case the attempt is to make a conveyance by the debtor, operate as a revocation of the power. If it could do so at all, what

limit is there as to the time when it should have that effect—why not as well within a week after the sale as within a month or a year? I can see no principle on which to hold the one which would not equally apply to the other. Admitting that the lands were not bound by the judgment in 1841,—and indeed it has been so decided,—yet they are bound by the execution; and it would be a strange doctrine to hold that they are only so bound *until* the sale and were at the disposal of the debtor during any interval between the sale and the conveyance. I do not think this is the law; but, on the contrary if there be any difference, I should think the sale of lands duly seized under execution would be the rather entitled to prevent the debtor executing any disposing power over them. In our opinion the rule should be made absolute to enter the verdict for the defendant.

Rule absolute.

BROWN V. THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF SARNIA.

Municipal Corporations—Notice of Action—12 Vic. ch. 10, 14 & 15 Vic. ch. 54. Municipal Corporations are not within the provisions of 14 & 15 Vic., ch. 54, and are therefore not entitled to notice of action.

CASE.—The declaration stated that the plaintiff was possessed of a certain farm and tenement, being the west half of No. 4 in the 4th, and No. 4 in the 5th concession of Sarnia: that there is and long has been, a highway passing between the 4th and 5th concessions of Sarnia, passing from east to west, between the said lots: that there is and long has been a water-course or drain, passing from a point on the west half of 4 in the 4th concession, in the said road where it passes between said two lots, and along the south side of the road, and thence across and under the said road into No. 4 in the 5th concession; by means of which drain and of the water passing along the same, the west half of four in the 4th concession was, until the committing, &c., and of right should continue to be drained from stagnant and injurious water; that there is and long has been, to the eastward of plaintiff's farm, and near said road, a swamp, and certain creeks and drains crossing the said road, and running alongside of the same, to the eastward of plaintiff's farm; and also to the

westward of plaintiff's farm, near said road, another swamp and other creeks and drains crossing said road and running alongside of the same, to the westward of plaintiff's farm : that up to the committing the grievances, the water in said swamp and creeks, &c., had flowed on without injury to plaintiff's lands, and should of right have continued so to do ; yet the defendants, well knowing, &c., on, &c., and on divers other days, &c., injuriously cut and opened and kept and keep open a drain along said road, and from and through said swamp, and creeks and drains, to the westward of plaintiff's farm so as to join the drain of plaintiff; and also at the same time cut and opened, and kept and keep open another drain along the said road, from and through the said swamp, and creeks and drains, to the eastward of plaintiff's farm so as to join the drain of the plaintiff; and thereby the waters of the said swamp, creeks and drains, are diverted and carried from their natural courses, and are carried into the plaintiff's drain, so that the waters therein are raised much above their usual height, and the plaintiff's drain is prevented from draining the west half of No. 4, as it formerly had done; and the waters of said swamp, creeks, and drains, have been caused to overflow plaintiff's farm, and twenty acres thereof are covered with water, and the plaintiff is prevented from free egress and regress, and his farm is rendered wet, and his buildings are damaged.

Pleas—1st. Not guilty. 2ndly. Denial of plaintiff's possession.

The third plea was demurred to. (a).

The case came up for trial at Chatham, in April last, before McLean, J. The plaintiff gave evidence that the reeve of the township of Sarnia, and two of the councillors, gave directions as on behalf of the Council, for the cutting of the drain complained of; and one witness said he knew the council gave out a contract for the execution of the work. Evidence was also given to shew that it was injurious to the plaintiff. In cross-examination it was shewn that a portion of the work let out was done by the plaintiff himself; but this portion seemed to assist in carrying water into the drain in the road of Lot No. 5. After the plaintiff's case was closed,

(a) The demurrer is reported ante, page 87.

the defendants' counsel addressed the jury at a great length, and then moved for a nonsuit, on the ground that the defendants were entitled to a month's notice of action, under the statute 14 & 15 Vic., ch. 54, coupled with the Interpretation Act 12 Vic., ch. 10, sec. 5; and the learned judge, adopting that view, nonsuited the plaintiff, reserving leave to move against his ruling.

In Easter term *Hagarty*, Q. C., obtained a rule nisi accordingly, insisting that the 14 & 15 Vic., ch. 54, did not apply to the defendants, a municipal corporation; and that, even if it did, as they had not pleaded the general issue by statute, they could not claim the protection of the act.

Albert Prince, contra, relied on the effect of the Interpretation Act as entitling corporations to claim whatever protection the Legislature conferred upon persons; and contended that on the authority of *Marsh v. Boulton*, 4 U. C. R. 354, it was unnecessary to mark the plea "by statute."

Hagarty, Q. C., in reply, cited *Carpue v. London and Brighton R. W. Co.*, 8 Jur. 464; *Bartholomew v. Carter*, 9 Dowl. 896; *Davey v. Warne*, 14 W. & W. 199. He also referred to 14 & 15 Vic. ch. 109, sec. 35; and to 12 Vic. ch. 10, sec. 5, part 28, as shewing that the preamble of an act is to be deemed a part of it, and argued that the preamble of 14 & 15 Vic. ch. 54, shewed clearly that the statute was not intended to protect Municipal Councils.

BURNS, J., delivered the judgment of the court.

The question raised in the argument, whether the plea of not guilty should have been marked "by statute" in the margin, and be so stated upon the record, in compliance with the rule of court for that purpose, does not properly arise in this case, for another and more important question must first be determined, and that is, whether the statute 14 & 15 Vic., ch. 54, applies to corporations sued for a misfeasance. The case of *White v. Clark* (10 U. C. R. 490) is certainly at variance with *Marsh v. Boulton* (4 U. C. R. 354), upon the subject of so making the plea; but in the case now before us, before the plaintiff can say that the plea is bad because not so

marked, we must first say whether the defendants can rely upon the plea of not guilty in order to put the plaintiff upon proof that a month's notice of action was given. There is nothing in any of the municipal corporation acts which enables the corporation in any case to plead the general issue, and give the special matter in evidence under such plea. The case rests, as it has been put by the defendants' counsel at *Nisi Prius* and now urged, upon the effect of the Interpretation Act, 12 Vic., ch. 10, sec. 5, combined with the provisions of 14 & 15 Vic., ch. 54.

The Interpretation Act enacts, in these words, "that each provision thereof shall extend and apply to each act passed in this present session, or in any future session of the Provincial Parliament, except in so far as any such provision shall be inconsistent with the intent and object of such act, or the interpretation which such provision would give to any word, expression or clause, shall be inconsistent with the context." The 8th subdivision of the 5th section declares that the word *person* shall include any body corporate or politic, and it is under this provision that it is contended the defendants can claim the privilege of the 5th section of 14 & 15 Vic., ch 54, which enables the general issue to be pleaded, and that under it all special matters can be given in evidence, for justification or excuse. If this be so, then the defendants can claim the privilege of the 2nd section—that no judgment or verdict shall be rendered, unless notice in writing shall be given a calendar month before suing out the writ.

Upon a consideration of the provisions of 14 & 15 Vic., ch. 54, it would be inconsistent with the intent and object of the Legislature, as expressed in the preamble, which was to alter, amend and reduce into one act the various acts whereby certain protections and privileges were afforded to magistrates and others, because they were not of a uniform character. Though we might believe the intent to have been to confine the provisions of this statute to *individual persons*, and not persons as a corporate body, from the words used, "magistrates and others," yet if the other act was so strong that the word *person* must be taken to mean a corporate body in this instance, of course we should feel bound to place such a con-

struction upon it. It does not depend upon the preamble, whether the Legislature meant that it should only apply to individual persons; but when we consider the context of the act, it is apparent that it can receive no other construction. There are only two modes provided for the service of the notice of action—that is, personally, or by being left at the usual place of abode—both of which are altogether inapplicable to Municipal Corporations. The service of a notice of intention to commence an action would not be within the meaning of the provisions of the act 3 W. IV. ch. 7, which provides for serving the head of a corporation with writs and process, and other papers and proceedings before final judgment. Personal service upon a corporation cannot be interpreted to mean upon the head of the corporation. The head of a municipal corporation has no duties save those mentioned in the act, except when the councillors are met upon the business of the township; and, though it would be his duty, if process were served for the commencement of a suit, to bring the matter before the council, and though it may be argued that it would be as easy for him to lay the notice of action before the council, as it would be in the case of the service of process, yet we have to consider whether the Legislature intended the provisions of 14 & 15 Vic., ch. 54, to extend to these corporations, and not whether it be expedient that they should do so, or to devise plans and modes of service in order to effect the object of such expediency. Personal service could not be made, save by substituting it to be upon the head of the corporation, or upon the councillors; and then, in either case, the service would be but upon a part of the corporation. The service of process upon the head of the corporation is made valid by act of parliament. The alteration of service, when not personal, is obviously inapplicable to a municipal corporation. These considerations are sufficient to establish that the Legislature intended the protection and privileges granted by 14 & 15 Vic. ch. 54, for *individual persons* fulfilling a public duty; and the word *person*, as used in this act, did and does not mean a corporation. The nonsuit should be set aside without costs, and a new trial be granted.

Rule absolute.

BRADLY V. THE GREAT WESTERN RAILWAY COMPANY.

G. W. R. R.—Obligation to erect fences—4 W. IV., ch. 29—14 & 15 Vic. ch. 51.

Under 4 W. IV., ch. 29, sec. 9, the Great Western Railway Company are bound to put up sufficient fences along their line of road while the work is in progress.

Quære as to how far this duty is incumbent on companies under the Railway Clauses Consolidation Act.

The declaration was in case, and alleged that, in making their railway, the defendants threw down the fences which were protecting the plaintiff's crops; and that it was their duty to erect and maintain sufficient fences along the line of the railway through the plaintiff's property, and to substitute other fences for those which they had pulled down; and charged, as a breach of their duty, that, though a reasonable time had elapsed, they had put up no fences, but left his lands and crops exposed, whereby damage had accrued, &c.

The defendants pleaded—1st, Not Guilty; and 2ndly, That it was not the duty of the defendants to erect the said fences, or any fence, in manner and form, &c.

At the assizes no evidence was given, but a verdict was taken by consent for £37 10s., subject to the opinion of the court upon the alleged duty.

Vankoughnet, Q. C., for the plaintiff, cited the *Stockton and Darlington R. W. Co. v. Barrett*, 3 M. & G. 956; *Parker v. the Great Western R. W. Co.* 7 M. & G. 253; the *Attorney-General v. the London and South Western R. W. Co.* 3 DeGex & Sm. 539; *Lawrence v. the Great Northern R. W. Co.* 16 Q. B. 643.

Cameron, Q. C., contra.

ROBINSON, C. J.—The 14 & 15 Vic., ch. 51, (the Railway Clauses Consolidation Act), does not effect this case, but only applies to railways to be undertaken after that act passed. Under such provisions as are made there, it might be a nice question whether the Company were or were not at liberty to take down the fences which a proprietor had around his growing crops, and to leave all open for six months, even when they were requested to enclose them.

But for the determination of the question which has arisen between these parties, in relation to the "Great Western Railway," (formerly the London and Gore Railroad,) we

must be governed by the act of incorporation for that company, 4 W. IV., ch. 29 (a) ; and we find, in the 9th clause of that act, that it is made imperative upon the company "to erect and maintain, *during the continuance* of the corporation, sufficient fences *upon the line of the route* of their railroad or way."

Then, looking at the facts stated in the declaration, and which we must take to be admitted upon this case, I can see no room to doubt that there was such a duty incumbent upon the defendants under the facts stated, as is alleged in the declaration. The plaintiff's land was and is *upon the line* of the route of the railway. There is nothing in the statute to prevent the duty attaching till the railway is completed. The words are, "upon the line of the route of their railroad or way," and that line is sufficiently designated when the company begins to make it, and to throw down private enclosures in order to make it. It would be unreasonable not to make it their duty to enclose the lands which they found enclosed, until they had completed their work.

The general clauses in the late act seems, I think, to have chiefly, if not solely, in view, the guarding of the cattle of private proprietors from meeting with accidents from the railway trains ; and they leave the company six months to do this in, after they shall take possession of the land, making them answerable for any accidents, however, that may happen in the meantime, from the leaving their railway exposed. But the circumstance of those clauses being so framed does not warrant us in holding that this plaintiff is without redress for the injury of having his fences pulled down, and his crops left exposed to cattle, when the company are bound, by the express condition of the charter which I have referred to, and without limitation as to time, to erect and maintain sufficient fences upon the line of their railway. I do not consider that there is any question before us upon the sufficiency of the declaration in point of form, but that we are to pronounce whether, upon the facts set forth in the declaration, the defendants have been guilty of a breach of duty in not putting up the fence to protect the plaintiff's

crops while their railway was in progress; and I think they were, by reason of the direction in the ninth clause of their act of incorporation.

DRAPER, J.—I am also of opinion for the plaintiff, and I think it clear that the duty of erecting fences on each side the line of railway is imposed by the act 4 W. IV., ch. 29, sec. 9.

The declaration states, that the defendants did proceed with the laying and erecting the road on, over and across the farm of the plaintiff—the road entering on the plaintiff's farm on one side and passing across to the other side; yet, although the defendants proceeded with the building of the road across the plaintiff's farm, and in so doing threw down the plaintiff's fences which theretofore enclosed his land, and though it thereupon became the defendants' duty to put up fences on each side of their railway, and though a reasonable time for so doing hath elapsed, yet, &c.

Now the defendants might enter (sec. 11) by consent of the owner, without waiting for a conveyance of the land; and (by sec. 4) they have three months to pay the compensation awarded, in default of which their right to assume the property shall cease, and the proprietor may resume his occupation—which implies strongly that they may enter before payment. And, as it is alleged that they have entered and commenced the construction of the road, it does not lie in them to call on the plaintiff to establish that their entry was lawful. He does not complain of it; and the court must, I think, assume that they entered in pursuance of the powers conferred on them. If so, the duty attached, and a reasonable time within which to fulfil it having elapsed, I think the plaintiff has a clear right of action.

BURNS, J., concurred.

Judgment for plaintiff.

THE QUEEN V. HESPELER ET AL.

Quo warranto.

Held, that the office of director in the Galt and Guelph Railway Company was not an office for which an information in the nature of a *quo warranto* would lie.

Irving obtained this term a rule upon the defendants to

shew cause why informations in the nature of a *quo warranto* should not be exhibited against them, to shew by what authority they claim to exercise the office of directors of the Galt and Guelph Railway Company, upon the following grounds :

1st. That they had not a majority of legal votes of the shareholders at the election for directors, convened at the City Hall, at Hamilton, to be held at noon, on Thursday, the 18th of August, instant.

2ndly. That 1000 votes of the 1310 votes declared by the sureties to have been given for these defendants, were given by one Henry McCracken ;—that the votes of the said Henry McCracken were illegal, upon the following grounds :—

1st. That the shares were not subscribed for *bonâ fide*.

2ndly. That they were subscribed for after 12 o'clock, noon, on the 18th of August 1853, being after the hour for which the meeting of shareholders had been convened.

3rdly. That they were subscribed in a book in Hamilton, which book was appointed by the members of the said company for subscriptions to be received at the post-office in Preston, and not elsewhere.

4thly. That no deposit was paid on the shares.

5thly. That the books for receiving subscriptions, and issued by the members, as incorporated, was headed “deposit, five per cent.”

And upon the grounds that John Davidson, James Crombie, Morris Lutz, William Robinson, Dominic Rumore, and Æmilius Irving, had the majority of legal votes, and ought to have been returned elected, instead of the defendants.

The affidavits filed in support of the application stated in substance this case—That before the meeting of the 18th of August, 1853, called for electing directors, the applicants, and several other inhabitants of Galt, had subscribed in the stock-book there upwards of six hundred shares (of £25 each), some subscribing forty shares, others twenty shares, on which all of them paid at the time five per cent : that most of these subscribers gave their proxy to one of them to attend and vote for them at the election ; and that the proxy, with other subscribers from Galt, did attend, at Hamilton, pursuant to an advertisement which had called a meeting to be

held there, on the 18th of August, at 12 o'clock, noon, in order to proceed to the election of directors: that the stock books of Guelph and Hamilton were present when they first assembled, and that for Preston was also brought in: that the person who had been appointed to open the stock-book at Galt attended also, with the book sealed up, which he produced when called for: that one of the Galt subscribers had asked whether he could then subscribe for additional stock, and was told he could not, as that was the day appointed for the election: that the Galt stock-book was opened, and examined by some of the shareholders from Guelph and Preston: that thereupon the person who had in charge the Preston stock-book took it away, and went out, followed by one of the Guelph shareholders: that one of the shareholders of Galt then desired that they should proceed in the election, as 12 o'clock had arrived, but was told that they could not, because the Preston book was absent; that in about twenty minutes that was brought in, with a subscription added, which had been made in the interval by one McCracken, a bar-keeper at a tavern in Hamilton, for one thousand shares; that they proceeded to the election; no deposit of five percent. having been paid on the shares, except by the Galt subscribers: that the stock taken by McCracken decided the whole election: that the Galt shareholders, as soon as the result was declared, protested against the election; but that the directors, so chosen nevertheless have since met, and acted as directors.

In answer many affidavits were filed. The defendants chiefly relied upon the fact alleged in these affidavits, that no objection was made to McCracken's voting, though he attended and voted openly, until the result was known: and that the defendants, from the conduct of the Galt shareholders in subscribing late, only the night before the meeting, inferred that their stock was not taken for the purpose *bonâ fide* promoting the work, but in order to give the people of Galt a control, such as would enable them to defeat the undertaking, by taking such steps as would give dissatisfaction to the several municipalities of the neighbourhood, and deter them from encouraging the work; or for the purpose of diverting

the line of road so as to benefit Galt, by preventing a station from being fixed at Preston.

They denied that there was any necessity for paying five per cent. before directors were chosen; but they were particularly silent as to the misconduct charged, of palming upon the meeting a fraudulent subscription of the bar-keeper for one thousand shares.

Hagarty, Q. C., and *Vankoughnet*, Q. C., shewed cause, and cited *Darley v. The Queen*, 12 Cl. & Fin 520; *The Queen v. Owen*, 15 Q. B. 476; *The Queen v. Mousley*, 8 Q. B. 946; *The King v. The Corporation of Bedford Level*, 6 East, 356; *The King v. Trevenen*, 2 B. & Al. 339, 479; *The King v. Ogden*, 10 B. & C. 233; *The King v. Parry*, 6. A. & E. 820; *Macbride v. Lindsay*, 9 Hare 582; *Cooper v. The Earl of Powis*, 3 DeGex & Sm., 688; *Rex v. Daws*, Burr. 2123; *Regina v. The Guardians of St. Martins in the Fields*, 15 Jur. 800; *The King v. Shepherd*, 4 T. R. 381; *Cole on Quo Warranto*, 110, 114, 118, 138; *Grant on Corporations* 282; *Tapping on Mandamus*, 26, 27, 190, 243; 4 W. IV., ch. 29; 7 W. IV., chaps 61, 62, 63, (Local and Private Acts): 9 Vic., ch. 81; 14 & 15 Vic., ch. 51, sec. 3; 16 Vic., ch. 42.

Connor, Q. C., and *Irving*, contra, cited *Salomons v. Laing*, 6 Railw. Cas. 301; *Colman v. The Eastern Counties R. W. Co.*, 4 Railw. Cas. 523; *Cohen v. Wilkinson*, 5 Railw. Cas. 748; *The King v. Jefferson*, 5 B. & Ad. 855; *Faulkner v. Elger*, 4 B. & C. 449; *The Queen v. Quayle*, 11 A. & E. 508, 512; *The King v. the Ministers and Churchwardens of Stoke Damerel*, 5 A. & E. 584; *The King v. Mein*, 3 T. R. 598; *The Queen v. The Bank of Upper Canada*, 5 U. C. R. 338; *Grant on Corporations*, 307; *Angell & Ames on Corporations*, 693-5; *Cole on Quo Warranto*, 191; 4 W. IV. ch. 29, sec. 22; 9 Vic. ch. 81, sec. 34.

ROBINSON, C. J.—We have considered with a good deal of anxiety what course we ought to take upon this application, for the question of law involved is one really of great importance, and the facts which are brought before us in support of the rule are such as seem to call very loudly for interposition, in whatever may be the most convenient and effectual form.

If we had thought that there was any room to doubt whether we should at last refuse or grant the writ, we should have taken time to form our decision more deliberately, and to express the grounds of it more at length; but we cannot say that we have any hesitation as to the conclusion we must come to, and it may be of consequence to those interested that they should know, without unnecessary delay, what will be the result of this application.

In the case in this court, which was referred to by Dr. Connor, of *The Queen v. the Bank of Upper Canada* (5 U. C. R. 338), where the application was for a mandamus to the corporation to proceed to a new election of directors, we had occasion to consider whether the remedy by information in the nature of a *quo warranto* might not be applicable to the case, and we expressed a doubt "how far a trading corporation, such as the bank, not connected with any purpose of public government, would be the proper object of a proceeding by *quo warranto*." In what was said by me on that point, I assumed that it might be, where the object is not to call in question by what right a subordinate officer of the corporation pretends to hold his office, but whether the corporation itself has not, as a body, acted in disregard of the provisions of their charter.

It was not, however, the remedy by *quo warranto* that was applied for in that case, and I believe in no instance, either before or since, has the attempt been made to obtain the warrant of this court for such a proceeding in regard to any trading corporation. If we should grant it in this case, we should, as we think, be making an innovation in our legal system of a very important, and perhaps indeed a very salutary character, but still an innovation, and that, too, in regard to a proceeding which partakes of the character of a criminal prosecution. The learned counsel, who argued this rule very ably, referred very particularly to the late case of *Darley*, in Error, reported in 12 Cl. & Fin. 520, as containing perhaps all that could be found in our books bearing on the proper application of the remedy by *quo warranto*. We have examined it carefully throughout, and with much interest, for in the very learned arguments of the counsel, and of

the eminent judges, who took part in the discussion, the law of the subject seems to be exhausted. The question raised in that case, however, was not whether an office in an aggregate corporation created for trading purposes is one for which an information in the nature of *quo warranto* will lie, but whether the office of treasurer of the public money of the County of the City of Dublin is such an office; and, after a very full and elaborate discussion of the nature, and tenure, and duties of that office, it was determined that it is. But from the beginning to the end of that case I find nothing to give countenance to the idea that the remedy by *quo warranto* can be properly extended to the office of director, or in any other office, in a corporation of the nature of the Galt and Guelph Railway Company. The case of *Rex v. Nicholson* (Strange 299), which was there cited, has perhaps more the semblance than any other of an authority in favor it, but it falls very far short. Indeed, nothing was cited in the argument before us, and we are persuaded nothing could be produced from English text books or reports, that we could rest upon as warranting an information in this case. Dr Connor did indeed refer us to a passage in the very comprehensive American work of Angell and Ames on Corporations (693) and following pages), which shews that in some of the courts of the United States this remedy has been extended to the case of officers in banks, insurance offices, railway companies, and would, no doubt, be, upon the same principle, extended to officers in other trading corporations; but we cannot, for obvious reasons, adopt the authority of these decisions, in opposition to those of the English courts by which we are bound. The American courts have confessedly departed, in several particulars, from the principles of the common law of England applicable to corporate bodies, even without the aid of local statutes; and, besides this, in several of the States, statutes have been passed which expressly extend the proceeding by *quo warranto* beyond the class of cases to which it seemed to be confined by common law. In the same work referred to, the learned authors remark the deviation in their courts from the current of English authorities on this point, for they say, page 707, that "in England,

where the franchise no ways concerns the public, as all those franchises which relate to the government of a corporation, or the election of members of parliament, or to fairs and markets, are said to do, but is wholly of a private nature, as a coney-warren, or the office of a churchwarden, the information will be refused."

What other remedy there may be for any such abuse as is complained of in this case, is a question of great interest in this country. We feel that whatever difficulty that question may give rise to, we must abstain from pursuing a course for which we have no precedent or foundation in English authority. This railway company is established by statute, it is true, (16 Vic. ch. 42); so are all our banks and insurance companies, and a great number of corporations of less general interest. The preamble shews that it was not merely for the private gain of the petitioners that this railway company was incorporated, but because it was also thought desirable on public grounds. But the same thing may be said of almost every statute incorporating any of our trading corporations; no doubt they all have the public good in a measure in view. We have not omitted either to consider, that this statute requires that the line of railway shall be approved of by the Governor in Council, which is another argument that the legislature regarded it as a matter affecting the public welfare. We think that these, which are scarcely peculiarities in this act, are not sufficient to give the jurisdiction in question.

I forbear to remark further upon the extraordinary grounds upon which the election of directors in this case is impeached, than to say that it seems surprising that the statute should have provided so little check against so manifest an abuse. There seems really to be no provision in it, as to who the directors are to be chosen by at the first meeting, or how the votes of the electors are to be regulated; but the statute does in one part (sec. 6) speak of *bonâ fide* subscriptions for stock, as if contemplating the possibility of fictitious and fraudulent subscriptions.

If it can be held that the provisions respecting voting for directors, which are contained in the statute 4 W. IV., ch. 29, are, under the 8th clause of the statute 16 Vic., ch. 42, to be considered as forming parts of this latter act, then a

question might be raised, whether the 15th and 16th clauses of the 4th W. IV., ch. 29, taken in connection with the 6th clause of the 16th Vic., ch. 42, do not fairly require that the stock voted upon shall have been held one month prior to the time of voting. If that should be so, which I by no means intend to determine, then the Galt shareholders, it should seem, would have been excluded, as well as the bar-keeper who put down his name, within a few minutes of the election, for £25,000.

We might, if we considered the right to the remedy by *quo warranto* in this case in our courts a question of doubt, have allowed the writ to go, in order to have the point raised formally upon record by plea and demurrer (as it was in Darley's case 12 Cl. & Fin.), and more solemnly adjudged; but, entertaining no doubt that we should not feel ourselves warranted in upholding the proceeding, we think it better, on several accounts, to decline granting the writ.

BURNS, J.—The legal difficulties in the way of granting the present application are, in my opinion, insurmountable; and therefore it is not necessary to scrutinize the case upon its merits. It was argued, on the part of the defendants, that "The Railway Clauses Consolidation Act" had no bearing upon the case, because that act was not incorporated with the charter creating the Galt and Guelph Railway Corporation. On the other hand, it was argued that it was incorporated with the charter, and therefore furnished an argument in favour of the application, because the body of directors partook of the nature of a public body, dealing with, and having rights conferred extending over and affecting the public interests. It is not necessary in this case to decide this question; and I have merely mentioned it, in order to guard myself against being supposed to think that the corporation of the Galt and Guelph Railway is not bound by the provisions of the Railway Clauses Consolidation Act. I do not say the company is so bound, but I am more inclined to think it is than the contrary. It is a singular fact that the Hamilton and Toronto Railway Company, the London and Port Stanley Railway Company, the London and Port Sarnia Railway Company, and the Galt and Guelph Railway Company—

all charters passed during the session of parliament of 1852-3—should contain similar provisions for incorporating the provisions of the act to incorporate the London and Gore Railroad Company, and the other acts reviving, extending, and amending the same, or relating to the company thereby incorporated, and now called the Great Western Railway Company, and be silent as to the provisions of The Railway Clauses Consolidation Act, while every other railway charter created during the same session has a provision that the several clauses of "The Railway Clauses Consolidation Act" shall, save as they are varied or modified, be incorporated with the specific charter. The difference could not be accidental; but it may well be asked why the railway companies I have named should be exempt from the general provisions, when the legislature, in 1851, declared "it is expedient to establish a general and uniform system, for the construction and management of all railways hereafter to be undertaken in Canada;" The question will be, notwithstanding this difference, between the companies named and others, whether the named companies are exempt from the provisions. The charters for these companies could not have been granted without being subject to the provisions of the 5th and 6th sections of The Railway Clauses Consolidation Act; had these sections not been repealed by chapter 2, passed on the 7th of October, 1852, to prevent their operation upon the railway bills of that session. It is under the 18th section of the general act that the different municipalities are enabled to take stock in any of these railways; and if, by reason of not mentioning the general act in the special one, the general act is thereby excluded then none of the municipalities through which the railways named will run, can take any stock in those respective undertakings. The terms of the first section of the general act seem wide enough to embrace the case of a railway authorized to be constructed after 1851, whether the charter shall contain an allusion to incorporating the general act or not, unless the third section of the act is to be looked upon as restrictive. At present I am not inclined to think it is restrictive, but, on the contrary, I look upon it as cumulative—that is, there may be special acts amending charters granted before the

general act, and other acts requiring the provisions, or some of the provisions, of the general act to be mentioned or incorporated, and in such cases it will be sufficient to refer to them in the mode specified in the third section. Instances of this occur in chapters 45, 49, and 239, of the session 1852-3.

Independent of the question in the abstract, whether a *quo warranto* be the only remedy which can be resorted to for the purpose of trying the validity of the election of directors of a railway company, on the ground that the office is of such a public nature, and affecting the interests of the public in such a manner, as to induce the courts to extend this peculiar remedy to such cases, I do not see that it can be applied in the present case. In whatever way the case may be put or argued, it results in questioning the right of McCracken to be a shareholder or member of the Company. If he be legally a member of the company, of course he has a right to vote as he pleases. The question, in truth, is not like the case of a voter in a municipal corporation, whose right to vote is the only question, and does not involve his right in or to any property. Here, before we can say the voter shall not vote, we must determine whether he be legally a shareholder, entitled by law to the shares he has subscribed for. The case of *ex parte Nash in re The Waterford, Wexford, Wicklow, and Dublin Railway Company* (14 Jur. 574), determines that the question cannot be tried by mandamus; and it was admitted that no authority previous to that time warranted the application for a *quo warranto*. There would be a difficulty in this case, on the ground that the person whose right of proprietorship is questioned is not before the court to maintain his rights, if no other difficulty presented itself. When we consider the provisions of the company's charter, however, it is difficult to say that persons may not subscribe for shares at the meeting for the purpose of electing directors, and even after the meeting shall have been constituted. It is only the first hundred shares which are to be subscribed for, to enable the subscribers to hold the first general meeting, which the act declares shall be *bond fide* subscribed for. The subscribers are to elect nine directors, who are to hold each twenty shares. If one hundred per-

sons were to subscribe each for a share, or five persons for twenty shares each, the meeting for election of directors could be legally held, but no election could take place, because not any of the hundred could be qualified, and the five, though qualified, would not be the requisite number. In any such case, either some of those who were shareholders must increase the amount of their stock, or else new shareholders must subscribe ; and, I apprehend, that might be done at the time, and while the meeting was being held. I do not see that we can deny the right to any person to become at any time a shareholder in the company, unless his motives and acts can be enquired into, and, according as they may be thought proper or improper, be held to sustain or deprive him of a legal right. The legislature should have placed safeguards against improper trafficking in shares of the company, or using the powers conferred, by becoming shareholders in an unlimited manner, for improper purposes, or unworthy motives ; but when no such checks are imposed, I can see no legal principle upon which a court of law can set itself up for the purpose of laying down a standard which shall govern. If we had the power to grant the writ in cases like the present application, still I apprehend it would be necessary that we should be convinced that some provision of the legislature had been infringed, or that some established and defined principles of law had been violated, before we should be warranted in interfering. I am not able to discover any authority in favor of the application ; and I fail to see any legal violation of the law either of parliament, or established and defined by custom, decision, or common consent and opinion. In fact it is a new case, so far as presented to a court of justice ; and at present, I fear, the remedy must be provided for by the interposition of the legislature, though I do not mean to say there may not be cases, as the law at present stands, which would warrant the court granting the application ; and I apprehend, from the current authority, whenever a proper case should be made, it would not be found to be any obstacle, that the consent of the Attorney-General had not been shewn to be obtained.

DRAPER, J., concurred.

Rule discharged.

. WINCH V. WELLER.

Appropriation of payments—Stipulation that account should not run over a week.

The defendant employed the plaintiff, a butcher, to supply his steamer with meat. At the close of 1851 he was indebted to the plaintiff, and authorized the captain of his steamer to pay this balance out of her earnings in 1852. The defendant also agreed with the plaintiff to furnish supplies for 1852, but stipulated that if the account were allowed to run over a week at a time he would not be answerable. The captain paid sums at different times in 1852, *on account of the current supplies*, but the account was frequently suffered to run over a week, and little more than half of the claim for the season was paid.

Held, that the defendant could not insist on such payments being applied to wipe off the balance due for 1851, on the ground that the plaintiff had forfeited his account for 1852 by allowing it to accumulate: and, therefore, that the plaintiff, having recovered a verdict for the balance due in 1851, was entitled to retain it.

ASSUMPSIT on common counts. Pleas—1. Non assumpsit. 2. Payment. 3. Set-off.

The case was tried in May last, at Peterborough, before Draper, J. The facts, so far as they are material for the decision of the questions brought before the court, were as follow:—The plaintiff was a butcher residing at Peterborough, and the defendant was the owner of the steamer *Forrester*, which was employed in running between Peterborough and the Rice Lake. In the year 1851 the plaintiff furnished meat for consumption on board the *Forrester*, and at the close of that year the defendant was indebted to the plaintiff in a balance of £27 4s. 8d., which the defendant authorized and instructed the captain of the *Forrester* for the year 1852 (one Albro) to pay out of moneys to be earned by the boat in 1852; another person had been the captain in 1851; and the defendant, as was proved, arranged with the plaintiff to supply meat from the *Forrester* in 1852, but on the following terms—that the plaintiff should only give credit for a week at a time, and that if he let the account run on for more than a week at a time without being paid, he (the defendant) would not be answerable.

After the close of the season for 1852, the defendant, apparently aware then that the plaintiff claimed a considerable sum—being much more than the amount for a week's supply—asked the plaintiff why he had trusted the *Forrester* against the instructions which defendant had given, and the plaintiff's reply was—"Oh, I knew you were good." Albro,

called by the plaintiff as his only witness, seemed to have had some differences with the defendant. He had kept the accounts on board the *Forrester*, and had obtained all the meat he required for the use of the boat from the plaintiff, but without attending to the defendant's arrangement with the plaintiff, though he admitted the defendant had told him not to let the account run more than a week, and that the plaintiff had told him such was his bargain with the defendant. The total amount of the plaintiff's account for 1852 was £56 15s. 2½*d.*, and the plaintiff had received, at different times, sums of money from Albro—amounting to £30 8s. 1½*d.* These sums were paid without reference to the state of the account for 1852, and without reference to the amount due for any particular week, and sometimes the plaintiff was over paid all he could claim for 1852 at the date of the particular payment. It was proved that the defendant only got possession of the account books kept by Albro relating to the *Forrester*, about a week before the trial. The defendant admitted the balance for 1851, with interest (£29 16s. 5*d.*.) but he insisted he was not liable for anything furnished in 1852, because of the plaintiff's disregard of the stipulations made as to credit; and then the defendant claimed that the payments made (exceeding £30) by Albro, should be applied to extinguish the balance due for 1851.

The jury were directed that the plaintiff was not entitled to recover for the account claimed for 1852, if they believed that the stipulation respecting the weekly credit was made by the defendant and assented to by the plaintiff, unless the defendant had waived the arrangement, or, having notice that a different system was being followed, acquiesced in it. As to the payments made in 1852, the jury were told, that, assuming they found for the defendant on the ground of the arrangement about a weekly credit, yet these payments made by the captain out of the earnings of the boat in 1852, and without specific direction to the plaintiff as to their appropriation, might be applied by the plaintiff to the payment of meat furnished in 1852, though, as the captain had been directed also to pay the balance due in 1851, there might be ground for so applying these payments, particularly con-

sidering that they were made without reference to the state of the account for 1852.

The judge expressing great doubt as to the latter point of payment, it was at last agreed that, if the jury only found for the plaintiff for the account for 1851, the defendant might move to enter a general verdict for himself, if the court should be of opinion that he could claim credit for these payments against that account.

The jury gave their verdict for the plaintiff for the balance due for 1851 only; and in Easter term *Weller* obtained a rule nisi to enter a verdict for defendant on leave reserved.

Adam Crooks shewed cause, citing *Lamprell v. Billericay Union*, 18 L. J. (Ex.) 283, S. C. 3 Ex. 283; *Bodenham v. Purchas*, 2 B. & Al. 39.

Weller, contra, cited *Frazer v. Bunn*, 8 C. & P. 704; *Goddard v. Hodges*, 1 Cr. & M. 33; *Waters v. Tompkins*, 2 Cr. M. & R. 723.

ROBINSON, C. J., delivered the judgment of the court.

It is not a question upon this rule whether in strictness the plaintiff might not have been allowed to recover his whole account of meat furnished by him in 1852, for it is not the plaintiff who is complaining of the verdict in rejecting improperly a part of his demand, but it is the defendant who has obtained the rule, insisting that upon the evidence the plaintiff ought to have failed in his action altogether.

It is not disputed that there was a balance due to the plaintiff for meat provided in 1851, amounting to £27 4s. 8d., nor that the plaintiff did in fact furnish meat during the year 1852 to the amount of £56 15s. 2½d. His claim, therefore, under both heads, would be about £84, exclusive of interest.

It is admitted, on the other hand, that £30 8s. 1½d. was paid to the plaintiff in 1852; and if the verdict given by the jury for £29 19s. 5d. should stand, the plaintiff would still have lost a large portion of his account (about £24) in consequence of its being set up as a defence that he has no legal right to recover it because he allowed his account with the captain of the boat to run more than a week in arrear, contrary to his express stipulation with the defendant. It may

seem rigid in the defendant to insist on this, but one can easily understand that it might be important for him to protect himself against losses by a condition of that kind, and by insisting on its being strictly observed.

The question for us however is, what is the legal consequence of that which has in fact taken place between these parties. What the defendant insists upon is, that he has a right to have the £30 8s 1½*d.*, which the plaintiff received from the captain of the boat in 1852, placed against the account left in 1851, which would leave almost the whole of the account of £56 for the year 1852 still open and in arrear; and that he can justly resist paying any part of that arrear, because the plaintiff improperly allowed that account to accumulate by a mode of dealing with the captain of the boat which was contrary to the express agreement with the defendant.

But we think we cannot accede to this. It was conceded in the argument that such payments as the captain made were made in liquidation of the account which he had himself run up in 1852: I mean that he paid the money on account of the supplies he had received. We could not hold that those payments were illegally made—I mean, in a manner not binding upon his principal, this defendant, so that this defendant could have recovered the money back. It is true that the captain had been directed to pay the debt of 1851, which had been contracted by his predecessor, out of the current earnings of the boat during the season of 1852, but there is no evidence that there was any arrangement or understanding that this was to be discharged before any of the current supplies for the current year were to be paid for; indeed that could not be, for then the latter would inevitably run in arrear, contrary to the defendant's own desire.

When the captain paid in moneys from time to time, in liquidation of the account which he was himself running up, the plaintiff had no option to apply the payment otherwise, and he has shewn no desire to do so. The effect of the defendant's stipulation on which he relies, as to his not giving credit, was not that the earnings of the boat should not be applied to paying any account for 1852 that was more than a

week old, but only that there should be no legal compulsory recourse upon him for recovering any balance that should be suffered to accumulate. Whatever the captain did pay on account of 1852 out of the earnings of the boat wiped off so much of the account, and *pro tanto* accomplished the defendant's object, which was that the captain should not at the end of the season have a settlement with him of the year's transactions, leaving him in ignorance of there being unsettled accounts standing against him for the supplies of the season, which the defendant might be afterwards held liable to pay. The defendant cannot in reason be understood to have stipulated that the captain should not pay any of the plaintiff's bills which had run beyond the week.

We consider it therefore quite clear that the plaintiff was not disabled by what occurred from recovering the balance admitted to be due for 1851, and this verdict gives him no more. This is all that it can be material to determine in disposing of this rule *nisi*, which asks that a general verdict should be entered for the defendant, and which rule must in our opinion be discharged.

Rule discharged.

HEMMINGWAY V. HEMMINGWAY.

Defence under Statute of Limitations.

A defence under the Statute of Limitations against a clear legal title is not one to be favoured, especially in cases between relations; and where the jury have leaned against such defence in support of the honesty of the case, and there has been no misdirection, the defendant must show very strong grounds to entitle him to a new trial on the evidence.

EJECTMENT for lot 5, in the 4th concession of Markham. Defence limited to the northerly portion of the lot, containing 85 acres, 2 roods, 17 perches, as described on a plan and survey, dated 8th of April, 1853, by John McPhillips.

The case was tried at the last Toronto assizes, before the Chief Justice of the Common Pleas. The title of Josiah Hemmingway, grandfather of the plaintiff, and father of the defendant, was admitted. He died in the fall of 1851. He had four sons, John, Peter, Benjamin, and Moses. The plaintiff was the eldest son and heir-at-law of Benjamin, who

died not long after his father Josiah, in December, 1831. The plaintiff's claim rested on a devise made by Josiah to his son, the plaintiff's father; and, unless the defendant had acquired a right to the premises defended for, no difficulty was thrown in the way of the plaintiff's recovery. But the defendant insisted that, at the time of his marriage in 1831, or very shortly after, he had moved into a house before then built by him on the premises defended for, and had been in exclusive possession ever since. For the plaintiff, several witnesses gave evidence to shew that the defendant had no exclusive possession until 1837 or 1838; that up to that time, his father, who had always resided on the homestead, was in possession of the whole. The homestead consisted of 300 acres, and the house in which Josiah lived was built to the southward of the eighty-five acres defended for. There was also a barn on the same part of the homestead as Josiah's house, into which, until within 14 or 15 years, the produce of all the farm, as well that claimed in this action by defendant as the residue, was placed. Some of the defendant's brothers and sisters gave evidence expressly shewing that they worked, within twenty years, for Josiah, on part of the premises in dispute. This evidence did not, however, extend to the whole; and, as to the house and the orchard immediately around it, there was no proof to displace the fact of the defendant having occupied them since 1831, excepting the inference with the jury might deduce from the evidence given to shew that Josiah retained possession of the other part of the eighty-five acres, and the evidence given by defendant's witnesses of acts of ownership, by cultivating the cleared land, and cutting timber and saw-logs, and making sugar in the woods.

The learned Chief Justice left it to the jury, on the fact of exclusive possession for upwards of twenty years before this action was brought (21st March, 1853), remarking that the evidence of exclusive possession was stronger as to the house, and the premises occupied for purely family residence, than as to the fields, and stronger as to the fields than as to the wood-land.

The jury found for the plaintiff.

Connor, Q. C., moved for a new trial on the law and evidence. *Hagarty*, Q. C., shewed cause.

The following cases were cited in the argument: *Doe Perry et al. v. Henderson*, 3 U. C. R. 486; *Doe Quinsey v. Caniffe*, 5 U. C. R. 602; *Doe dem. Taylor v. Proudfoot*, 9 U. C. R. 503; *Doe Cuthbertson v. McGillis*, 2 C. P. 124.

ROBINSON, C. J., delivered the judgment of the court.

The provisions of the present Statute of Limitations are stringent, operating, as we cannot but feel, very hardly in some cases against the true owner, where he has acted indulgently and confidingly, and where the facts being clear and well known, and having no suspicion that his title would ever be denied, he has allowed a relation or friend to remain too long in possession, without exacting from him a written acknowledgment of title.

When the possessor of an estate sets up a title under the Statute of Limitations, against one whose right is otherwise clear, and when he fails, because the jury, in a case at all doubtful, have leaned against this defence and in support of the honesty of the case, it should be a very strong case, we think, that should make us feel it incumbent upon us, if there has been no misdirection, to give a second chance to an unrighteous defence, by granting a new trial upon the evidence.

We see no misdirection here, and therefore discharge the rule; for, as to a part of the premises claimed, the jury would not have been warranted by the evidence in finding that the plaintiff was barred by the statute. The terms of the will of the testator, Josiah Hemmingway, the defendant's father, are so explicit as to leave no room for doubt that he devised his lands to be divided between his sons Moses and Benjamin, not intending to give any portion to his other son, this defendant. It was of no consequence to give such evidence as was given, and, as it seems, without objection on the defendant's part, probably because he intended to offer evidence of a similar description to prove a contrary intention—I mean with regard to the intention of the testator not to give any portion of his farm to the defendant, for reasons which he assigned—for the will is very clear, and it is by

that the defendant must be bound. No attempt was made to prove fraud in obtaining the will, or to throw doubt upon the defendant's competency to make a devise.

The defendant's only hope of defeating his father's will was grounded upon the Statute of Limitations. He attempted to maintain possession against the plaintiff, the heir of one of his brothers, to whom his father had devised the land in question, by shewing that he had been allowed to continue so long in possession that he could not now be dispossessed. That, certainly, is not a defence to be particularly favoured, especially in cases between relations; for we know that nothing is more common than for a father or brother to allow a member of the family to occupy land as an act of kindness, and without exacting rent, though without any intention of giving away the land. When the indulgence has incautiously been so long continued, as to enable the party thus favoured to take the advantage of twenty years' possession, and to set the true owner at defiance, if the facts are clearly made out, the statute must have effect, and the true owner must lose his land; but when an exclusive possession for twenty years is not clearly shewn, or where the evidence is unsatisfactory, doubtful, or conflicting, we ought not to find fault with a jury for supporting the legal title.

This case went very fairly to the jury, and the evidence to support their finding was ample, although, if some of the witnesses who were called by the defendant had been believed by the jury in all that they stated, their evidence might have warranted a verdict the other way.

Rule discharged.

HUGHES V. THE MUTUAL FIRE INSURANCE COMPANY OF THE
DISTRICT OF NEWCASTLE.

A judgment was recovered against a mutual insurance company, for the amount of a loss by fire. The execution was returned *nulla bona*, and the plaintiff applied for a mandamus to compel the defendants to pay over the money. In support of the application it was stated that an assessment had been levied by the defendants under their act of incorporation, for the purpose of paying this loss, and that they had received the money so levied.

The writ was refused, because it was not clear on the affidavits that the corporation had no property out of which the debt could be levied—the statement being merely that the execution had been returned *nulla bona*; and because the defendants alleged that they were, and always had been ready to pay over the money to *the persons entitled*, and the Court would not decide in a summary manner on conflicting claims.

But *quære*, whether the fact of the corporation having nothing which could be taken in execution would be a sufficient ground for interposing by mandamus.

Cameron, Q. C., obtained, in Easter Term last, a rule on the defendants, to shew cause why a peremptory writ of mandamus should not issue, directing them to pay to the plaintiff £568 9s. 2d., being the amount of the judgment recovered in this cause, together with interest, and the costs of this application.

This was obtained on an affidavit of the plaintiff's attorney, stating the judgment and execution and that the *fi. fa.* had been returned *nulla bona*: that he had demanded payment from the treasurer of the company, who had refused; and that the execution was wholly unsatisfied: that he was informed and believed that an assessment had been levied, under the Mutual Insurance Act, for the purpose of paying the loss by fire which gave rise to this action; and that the amount so levied was received by the defendants before this judgment was entered, and before the demand above mentioned was made upon their treasurer.

Richards shewed cause, and filed affidavits, shewing that the defendants had paid to the plaintiff £170 on account of his loss: that in consequence of an application made to the Bankruptcy Court, and proceedings there, they had paid into the sheriff's hands, to satisfy executions under which the sheriff had before the fire levied upon the goods which were afterwards destroyed, the further sum of £222 1s. 7d., which left due, they said, the sum of £114 19s. 0d., and no

more : that £62 19s. 5*d.* was due by plaintiff to the company for assessments upon his premium notes, made under the act, which they were entitled to retain, and which the plaintiff agreed they should retain out of the award : that the defendants had always been willing to pay the balance due to any person *entitled to receive the same*.

ROBINSON, C. J., delivered the judgment of the court.

We have not sufficient before us to enable us to dispose satisfactorily of this rule. It is a general principle that a mandamus should only go where a right is clear, and where there is no other adequate remedy. As to there being any adequate legal remedy, there is no doubt that in the statute which creates these mutual insurance companies, 6 W. IV., ch. 18, it is contemplated that persons suffering losses, and having claims upon the insurance company in consequence, are to take their remedy by action, as is constantly done, and would have been equally done if the act had been silent on the subject. This obvious remedy has in fact been resorted to by the plaintiff in the case before us, and he has obtained judgment and execution.

The ground he advances for his application is, that the return of *nulla bona* has been made to his execution ; that the corporation has no goods which he can seize, and that his legal remedy is, on that account, unproductive, while at the same time an assessment has been raised for the express purpose of meeting the plaintiff's loss. But if we were to assume that the fact of the corporation having nothing which can be taken in execution were a sufficient ground for our interposing by mandamus, when the right to the ordinary legal remedy by action is clear, which at present I have doubts upon, yet I do not see that the affidavits do make it clear that there is no property, either real or personal, belonging to the company, which could be taken and sold to satisfy this judgment.

Then it appears, upon the affidavits filed in shewing cause, that payments have been actually made to the plaintiff, which he ought to have stated in his affidavit ; and that the £222 1s. 7*d.* has been paid in consequence of certain legal

proceedings, upon executions which were in the sheriff's hands against the present plaintiff; and that there is an amount due by this plaintiff to the company upon his premium notes. The defendants declare themselves ready to pay the balance over to *any person entitled*. Whatever may be meant by that, and whatever may be the doubt as to who is entitled, it is not likely that we shall decide that in a summary manner by motion; and, at any rate, before we could be in a condition to do so we must know what is meant by this intimation of a conflicting claim; and, moreover, it ought to have been expressly stated on oath, in support of this application, not merely that the return of *nulla bona* has been made to their execution, but that there is in fact no property of the defendants, either real or personal, which can be taken in execution to satisfy the plaintiff. It is consistent with all that is before us, that the defendants may be transacting their business in a house owned by themselves, which could be sold for more than would satisfy this debt. It does not sufficiently appear to us that there is no other adequate remedy, and we should be satisfied of this before we can properly proceed by mandamus.

Rule discharged, with costs.

SUTHERLAND V. BLACK.

Three verdicts set aside—Misdirection.

Third new trial granted, the jury having found three verdicts against an officer of the Court of Chancery on insufficient evidence.

Held, that under the facts of this case (as set out in 10 U. C. R. 515,) it was a misdirection to tell the jury to find for the plaintiff if they were satisfied that the defendant received the money from him personally, and that he had not afterwards done or said anything to authorize the defendant to pay it out to his solicitor.

ASSUMPSIT on the common counts, for money had and received, &c.

The facts of this case have already been stated, and will be found in the report of the judgment of the court on the last application made for a new trial—10 U. C. R. 515.

The jury, on a third trial, again found for the plaintiff.

Vankoughnet, Q. C., obtained a rule nisi for a new trial, to which *James Boulton* shewed cause,

ROBINSON, C. J., delivered the judgment of the Court.

It is with very great regret that we find ourselves under the necessity, as we think we are, of sending this case again down to trial, which might perhaps have been avoided if the defendant had obtained a special jury.

Whatever we might have done in affording relief against this verdict if the case had, in our opinion, gone to the jury with a correct charge, we consider that we are bound to grant a new trial, in a case of this peculiar description, when it appears to us that an erroneous view was taken of the case by the learned judge who presided at the trial; and, with the deference which we all feel for the judgment of the learned Chief Justice of the Common Pleas, we think the defendant was under this disadvantage at the last trial.

We find in the learned Chief Justice's report of the trial, that he directed the jury to find whether the defendant received the money from the plaintiff personally; and if so, then to find in his favour in the action, unless they were satisfied that the plaintiff afterwards did or said something which authorized the defendant to pay the money out to his solicitor, Cole. We do not agree in that view of the law. The jury being led, as we may assume, to attach decisive importance to the question whether the defendant received the money from the hands of the client in presence of his solicitor, or from the solicitor in presence of his client, found specially that the defendant received the money from the plaintiff, as his agent, and deceived him in promising that he would pay the money into the bank, and not doing so afterwards—a finding which it appears to us there really was nothing in the evidence to support.

The solicitor, Cole, went with the plaintiff, his client, to pay a sum of money into the Court of Chancery, in a suit that was pending, or in consequence of a suit pending; they went first to the Master of the Court, in his office, who directed them to Mr. Black, the defendant, a clerk of the court, whose office was in the same building, and who, at the request of one or other, and in the presence of both, received it to be safely kept until a regular order should be procured for paying it in, when they were told it would go to the bank,

in which such payments were deposited, and would only be drawn out from thence by an order of the court. It was to the solicitor, and not to the client, that the defendant gave a receipt for the money.

Now, under such circumstances, we think it was wholly immaterial from which of the two the money was received, as that could only seem to the clerk to arise from the accidental circumstance that one and not the other had carried it into the office. 'As to his deceiving the plaintiff by anything that he was proved to have said, we can conceive nothing more unfounded than that appears to be upon the evidence. He might, no doubt, have said to one or the other, or to both, (and it would be indifferent to which of them he spoke), that they had no business to come and trouble him with the money, before they had got their order to pay it; but if he had, they would probably have thought him very unaccommodating and uncivil. They assured him they would bring the order the next day. His consenting to take charge of the money in the interval was an act of good nature, which he can hardly be censured for, and which certainly should not incline the plaintiff to put an uncharitable and unwarrantable construction upon his conduct. Having received it, as he did—without anything being said or done to give him notice that the client was afraid of his attorney's honesty, and insisted upon not being represented by him on any future occasion in regard to this money, unless he shewed a special authority besides his character of solicitor in the cause,—he was as safe, we think, in recognizing the solicitor as entitled to ask for the money on the next day, as he would have been had it happened to be the solicitor who had handed him the money instead of the client in his presence. No one could be expected to regulate his conduct by an anticipation that the solicitor whom the plaintiff had confided in would abscond, for no one, it appears, imagined such a thing.

On the last occasion of granting a new trial we stated the light in which this transaction appeared to us, and need do no more now than refer to the report of the case. Under the circumstances which took place at the last trial, we think the defendant is entitled to a new trial without costs.

It may appear hard that the plaintiff should lose the money ; but it is such a case as often occurs, when one of two innocent persons must bear a loss, and we may say as was said in *Robinson v. Ward* (2 C & P. 61,) "that all suspicion against the defendant is out of the question ;" and the plaintiff having placed confidence in the solicitor whose dishonesty has occasioned the loss, enabled them thereby to act for him in whatever related to the pending proceedings, and should bear the consequence of having employed, though unwittingly, an unworthy attorney. We do not see how the business of courts of justice could be conducted, if the officers of the court were expected to take upon themselves to question the authority of an attorney in any step in a cause ; nor how such officers could conduct the business in safety, if they must be responsible for the integrity of attorneys employed by the suitors, and were bound to entertain and act upon a suspicion that they are abusing their client's confidence, when nothing has been said or done to put them on their guard, or give them distinctly to understand that same particular proceeding they are expected to put the attorney on one side, and transact business only with the client. If in this case, Cole, the solicitor, had done nothing dishonest, but the money had been burnt or lost in his keeping before he could get it to the bank, or hand it over to the plaintiff, it would hardly have seemed reasonable to the plaintiff to hold the clerk in Chancery liable, but the fraudulent absconding of the plaintiff's attorney was a matter as little foreseen by any person.

New trial, without costs.

JOHNSON V. THE ONTARIO, SIMCOE, AND HURON RAILROAD COMPANY.

Compensation to tenants of land taken by O. S. & H. R. R. Co.—12 Vic. ch. 196, secs. 10, 12, 16.

A railway act provided that the company should make satisfaction "to all persons and corporations interested" in any lands which should be taken under the powers given, and should agree with the "owners or occupiers respectively" touching the compensation to be paid to them.

Held, that a tenant for a term of years was within the meaning of the act, and might maintain trespass against the defendants, who had entered and commenced their road, having made compensation only to the owner of the fee.

TRESPASS for breaking and entering the plaintiff's close, being the south half of Lot No. 22, 6th concession of Innisfil and breaking gates, consuming grass and corn, &c.

Second count—for trespass to the same half lot, and there making and constructing a railway, and continuing the same, and laying large quantities of earth on said close, &c.

Pleas—1. Not guilty, by statute." 2. Payment to plaintiff of £50, in full satisfaction, and acceptance thereof. Issue on both.

At the trial, at Barrie, in May last, before McLean, J., the plaintiff proved that he was in occupation of the premises in question, as tenant, under a written lease: that the defendants' railway was laid out, and partly constructed, though not finished, through his lot: that it was so constructed in 1852, and run through a wheat field of the plaintiff's, the level of the railway being in that part much lower than the level of the field, so that there was a cutting and excavation; then the railway for some distance ran on the level of the land, and then again an embankment was constructed, so that, except in one part, the plaintiff's land was severed, and in that part it was proved the ground was swampy, and access from one part to another of the farm was difficult. Gates had been erected to allow of the plaintiff's crossing the railway at this part; and both sides of the railway were fenced by the contractors with defendants.

It was admitted that the owner of the reversion expectant on the plaintiff's term (the length of which was not shewn) had been paid by the defendants for the land taken by the railway—whether before or after the commencement of the term did not appear. The plaintiff was nonsuited, on the ground that the right to make the road being secured by law, the plaintiff could not maintain trespass, but that case for the consequential injuries was his only remedy. Leave was reserved to move to set aside the nonsuit.

K. McKenzie moved accordingly.

Eccles shewed cause.

The statute and authorities referred to are noticed in the judgments.

ROBINSON, C. J.—The act of incorporation, 12 Vic. ch. 196, has been amended by subsequent acts, which, however, contain no provisions that effect this action. The 10th section authorizes the company to do what is here complained of, “doing as little damage as may be, and making full satisfaction, *in manner hereinafter mentioned*, to all persons, and corporations *interested* in any lands which shall be taken used or injured, and *for all damages to be by them sustained, in or by the execution of all or any of the powers hereby granted.*” We think this provision takes in the case of tenants, as well as of owners, and that the injury which they may sustain as occupants must be paid for by the company to them, besides paying the value of the same land (when taken) to the owner, if he is not at the time himself in possession.

Then the questions are—1st. Are the company bound to agree with the tenant for compensation, and to pay him the damage agreed on, or, in case of disagreement, to pay into court such damages as they consider to be sufficient, before they can lawfully take possession : and 2ndly. If they take possession without doing either, are they trespassers in so entering.

We must look at the 10th, 16th, and 17th clauses of the act ; and on consideration of these, we think that the statute in effect provides, that for any injury which the tenant as “occupant,” or as a person “*interested in*” the estate, may sustain by making the railway through the land occupied by the tenant, the company must, if they can, agree with the tenant upon the amount of compensation to be paid to him, and, if they cannot, then they must pay a sum into Chancery, and proceed under the arbitration clauses : and they have no authority to enter, for the purpose of making their railway and permanently occupying the land, till they have paid to the tenant a sum mutually agreed upon, or paid into court (when they have not so agreed) what they think fit to offer as a fair compensation ; wherefore I think here a trespass was committed, and the nonsuit should be set aside.—See *Lister v. Lobley*, 7 A. & E. 127.

DRAPER, J.—Upon considering the act, it appears to me, —1st. That, taking the 10th, 12th, and 16th sections together, the defendants are not authorized to take possession of lands, and to commence the construction of the railroad, until they have paid or tendered the sum agreed upon, or in case of disagreement, deposited a sum for compensation in the Court of Chancery. 2ndly. That an agreement with, or conveyance from, a reversioner or landlord will not enable the defendants to enter upon and dispossess the tenant in possession. The provisions as to “owners and occupiers,” and the reason of the thing, both appear to me to lead to this conclusion. If the reversioner had the power contended for, it must apply, whatever the duration of the term, and might lead to the greatest injustice. It does not appear to me any answer to say that the tenant may resort to his landlord for compensation. The landlord has no right to receive it, for it is a compensation for the immediate right of occupation, to which the landlord is not entitled; and the provisions enabling the defendants to deal with the lands of *femes covert*, infants, &c., do not extend to the protection of tenants, who, if their reversioners were under any such disability, might be unable, at least without great delay, and in many cases not at all, to get the compensation paid to such reversioners out of their lands.

Assuming, therefore, that the plaintiff's term had begun when the defendants entered, I do not see that he cannot, either by reason of the powers conferred on the defendants or by reason of any arrangement made with his landlord, maintain trespass: because, as appears to me, the 16th section makes payment either to the party entitled, or for his use, into the Court of Chancery, a condition precedent to the right of the defendants to take possession. In cases like the present, the defendants must deal with the “owners and occupiers,” with the tenant in possession and the reversioner, for their respective interests.

The case of *Ramsden v. The Manchester South Junction and Altringham Railway Company* (1 Ex. 723), so far as it is applicable, supports the plaintiff's case.

I have looked through all the various acts altering or

affecting the 12 Vic. ch 196, except the one assented to on the 14th instant, and find nothing in them to affect the question; and in the Railway Clauses Consolidation Act (14 & 15 Vic. ch. 51) section 11, sub-secs. 5, 19, and 20, the legislature has for the future established a similar rule to that applicable to the present case.

BURNS, J., concurred.

Rule absolute (a).

CLUBINE v. McMULLEN.

Ejectment—Estoppel—14 & 15 Vic. ch. 114.

At the trial of an ejectment, under the new act, a former recovery was proved in favor of John Doe, on the demise of the now defendant, against the now plaintiff: and it appeared that the question there decided, being one of boundary, was precisely the same as that again brought up in this case.

Held, clearly no estoppel, for that judgment was between different parties, and under the old practice.

Quere, whether the late act 14 & 15 Vic. ch. 114, has altered the effect of a recovery in ejectment, as regards estoppel.

Semle, per BURNS, J., that under the 8th section, it has not, *when the finding is for the claimants*.

EJECTMENT for the south half of the west half of Lot number four, in the fourth concession of Whitchurch. Writ tested 12th of March, 1853.

At the trial at Toronto, before Macaulay, C. J., it was admitted that the plaintiff owned the south half of the west half of No. 4, and the defendant No. 3, in the 4th concession of Whitchurch, and the question to be tried was, where the boundary between their lots was situated: if where the plaintiffs contended, then he was entitled to succeed. There was no special limitation in the defence, or description of the premises defended for; but the case was gone into at the trial as if the defendant defended for land in his possession claimed by the plaintiff as part of No. 4, but which the defendant claimed as part of No. 3. The principal points of fact contested at the trial were—whether a cedar tree, referred to by different witnesses, was sufficiently proved to have been an original monument or not, and whether, even if it were, there was not evidence of the actual position of the original monument between Nos. 3 and 4, which, in that case, must govern, and would

(a) See *Norwich Railway Company v. Woodhouse*, 11 Beav. 382.

entitle defendant to a verdict. Both these points were left to the jury, who found for the plaintiff.

But the defendant also insisted that he was entitled to recover, because he proved an exemplification of a former recovery, in a case wherein John Doe, on the demise of McMullen, (the now defendant) was plaintiff, and the now plaintiff was defendant, which ejectment was brought to recover the identical tract of land in question in this case, as appeared by the consent rule, and in which the plaintiff obtained judgment,—the claim being that it was part of No. 3,—and he insisted that this recovery, the self-same question of *boundary* having been litigated and decided, was an estoppel on this plaintiff. This objection was overruled by the learned Chief Justice of the Common Pleas, and the plaintiff had a verdict.

In Easter Term, *Eccles* obtained a rule *nisi* to set aside the verdict, and for a new trial on this point; and also insisting that the verdict was against evidence in respect to the original monument between lots 3 and 4.

James Boulton shewed cause, and denied there was any estoppel, as the former recovery was for No. 3, and this plaintiff pretended no title for any part of No. 3, claiming ownership on No. 4 only.

Eccles, contra, cited *Doe v. Wright*, 10 A. & E. 763; *Garrison v. Woodruff*, 8 U. C. R. 328; *Canada Company v. Pettis*, 9 U. C. R. 669; *Sherwood v. Moore*, 3 U. C. R. 468; *Doe Mills v. Kelly*, 2 C. P. 1.

ROBINSON, C. J.—Upon the merits, I am clear that the verdict was proper. It was satisfactory to the learned judge who tried the cause; it was manifestly in accordance with the evidence given; and it has the just effect of giving to each party a due portion of land, according to the intention of the government in the original survey; whereas what the defendant contends for would have the unjust effect of giving him a lot twenty-four chains wide, and leaving the plaintiff with one only sixteen chains wide, although both lots were granted by the crown as being of equal width. Every intendment should be admitted against such a pretension; the onus lies upon the party setting it up, to prove that, how-

ever unequal the effect may be, he is strictly and clearly entitled upon the evidence to insist on such a line of division—till he has done this the presumption is against him. But he totally failed to shew any such case: all the evidence that was given bore the other way, and shewed that the defendant was relying upon some evidence of a survey which was not the original survey, but made some years afterwards, and that the monument by which he would have the line governed was not the original post or monument.

I am clear that the former verdict in ejectment, in the defendant's favor, was no estoppel. It seemed to be supported by such evidence as was then given, and therefore the court declined to set it aside, leaving it to the then defendant, if he did not choose to acquiesce in it, to become plaintiff in his turn. But it is clear the verdict in that case cannot be made use of in this by way of estoppel, because that was an ejectment at the suit of John Doe, not of McMullen; the parties therefore are not the same; and it was upon the usual fictitious demise, the plaintiff going, as was then usual, only for the recovery of an alleged term. Whatever were the reasons derived from the form of the action which have always hitherto operated in preventing judgments in ejectment being final and conclusive, must apply to the present case, because the former recovery was in an action brought under the old practice.

When a verdict in ejectment, brought under the present system of proceeding authorized by the late act, shall be set up as an estoppel in another action of ejectment brought under the same statute, and being between the same parties, it will be time enough to discuss what is the effect of the statute as regards estoppel. The question does not arise in this case.

BURNS, J.—So far as the case depends upon the facts upon which the parties went to the jury, there is no reason to find fault with the verdict. The defendant offered no evidence, and the case depended upon the evidence of the plaintiff's witnesses, whether the stone monument placed in the *swale*, or the post placed by the surveyor, Lynn, was upon the true

boundary line between lots Nos. 3 and 4. Stegman appears to have run out the township originally ; and afterwards Wilmot, for some purpose, whether to settle any dispute which existed then does not clearly appear, made a survey of some of the lots upon this line. According to the weight of evidence, the stone monument in the *swale* was Wilmot's line, but the testimony goes to shew that his survey was disputed as not being correct. That line, it is contended, would make lot No. 3 more than 24 chains wide, and reduce No. 4 to nearly 16 chains. The question therefore, was, which of the lines correspond nearest to the original survey, and that depended upon the evidence to establish the nearest known and undisputed boundary. The objection made by the defendant to Lynn's survey is, that it was not made according to the statute. That depends upon the fact whether the cedar tree between six and seven is an original boundary monument or not, for it is by that tree that Lynn governs his survey. That was the question left to the jury, and they were asked to say whether that tree was an original monument, and they have found it was. The weight of evidence supports such finding, and consequently supports the survey. It may be that if the case depended solely upon Mr. Lynn's evidence, and his survey, it might not be found sufficient to support the plaintiff's claim and the verdict, because he does not prove certainly that he took the necessary steps to verify that boundary. The objection, however now fails, because a mass of evidence is brought to verify the cedar post ; and the simple question for the jury was, whether the surveyor had started from an original monument in order to divide the lots, and that being established by other evidence to the satisfaction of the jury, and the survey not questioned in other respects, it is not of any consequence that the surveyor did not satisfy *himself* at the time of survey, of the correctness of his starting point in the mode prescribed by the act.

The defendant's counsel relied at the trial, and now has again renewed the argument, that the present plaintiff is estopped from maintaining an ejectment against the defendant, by reason of the former recovery by the defendant in the ejectment mentioned. The case relied upon for this

position, *Doe v. Wright* (10 A. & E. 763), and other cases which may be mentioned, as *Doe v. Whitcomb*. (8 Bing. 46.) *Doe v. Huddart* (2 Cr. M. & R. 316), and *Doe v. Wellsman* (2 Ex. 368), do not apply to the action of ejectment. The reason why the recovery in ejectment is not final, as stated by Mr. Adams, is because the object of the action is to recover the possession, and does not settle the title; and the form of the action does not prevent any number of leases being stated in respect of the premises. The action for mesne profits may be brought against the defendant in the original action, or against any one in possession of the land, but when brought against one in possession of land who was no party to the action of ejectment, the recovery in ejectment is no evidence, unless the person in possession be connected with the ejectment action by some evidence—vide *Denn v. White*, (7 T. R. 112), *Doe v. Harvey* (8 Bing. 239). The action for mesne profits is a consequence of the action of ejectment; and when damages are sought only for the time for which the judgment in ejectment decides that the plaintiff was entitled to the possession, it is obvious that such judgment, when properly replied, should estop the defendant from saying that the plaintiff during that time was not entitled to his rents and profits of the land. For this reason the cases cited and relied upon are not applicable to the action of ejectment itself—this action applying only to the possession, and not determining the title. It is because of this inconvenience in the law, a branch of equity was established in the Chancery to file bills of peace, as they are called. In *Leighton v. Leighton* (1 P. W. 671), Lord Parker says: “It is certainly an inconvenience in the law that there should be no end of trials in ejectment, and that one trial in a real action (which perhaps may be a trial at *Nisi Prius*) should be final, when at the same time twenty trials in ejectment, and at the bar in Westminster Hall, will not be conclusive—vide *Earl of Bath v. Sherwin* (4 Bro. P. C. 373), *Dearden v. Lord Byron* (8 Price 417), *Devonsher v. Newenham* (2 Sch. & Lef. 208).

It is urged that our statute 14 & 15 Vic. ch. 114, which declares that “it is expedient to abolish all fictions of law in actions of ejectment, and to place such actions as nearly

as may be on the same footing as other actions between parties," will have the effect of introducing the doctrine of estoppel respecting the recovery of possession. The form of the writ given, and which answers for the count or declaration, states that the plaintiff "claims to recover certain premises, of which it is said you," the defendant, "are in possession," and notifies the defendant that "in default of such appearance you will be turned out of possession of the said property." Thus far we see that the frame and structure of the action points at the litigation between the parties to be in respect of the possession. The 8th section is, "that upon a finding for the claimants, judgment may be signed, and execution issue for the recovery of possession and costs, as at present in the action of ejectment, and the said judgment having the same and no other effect than at present." What effect this limitation of the effect of the judgment may have, when the verdict and judgment shall happen not to be for the claimant but against him, we need not say in this case; because the former action between the parties terminated in favor of the claimant then and now defendant. The intention of the legislature was clearly as respects the judgment in ejectment, when the claimant, to give no further force or effect to it than it would have had previous to the statute; and, as already shewn, the action of ejectment, whatever the result, was not conclusive, as the termination of a real action would have been.

DRAPER, J., concurred.

Rule discharged.

FISHER V. THE WESTERN ASSURANCE COMPANY.

Marine Insurance—Deviation.

The plaintiff effected an insurance with defendants on certain wheat, to be carried in a schooner *from port Darlington to Kingston, and from thence to Montreal* by such boats, barges, or vessels, as might be deemed necessary and proper for the safe transport thereof. The schooner proceeded to Port Sidney, *about three miles below Kingston*; the wheat was there transferred to a barge, which *returned to Kingston* in order to complete her cargo, and while so returning the barge was stranded, and the wheat lost. The plaintiff endeavoured to prove a custom in support of the course taken by the schooner, but the evidence only shewed that certain forwarders, having storehouses at Port Sidney, had been in the habit of doing as was done in this case; and it appeared that no such question as the present had ever been raised.

Held, that such evidence was wholly insufficient, and that the policy was avoided by the deviation in the voyage.

The plaintiff brought this action on a policy of assurance

against loss, to the amount of £400, on 2206 bushels of wheat, *from Port Darlington to Kingston*, shipped on board the schooner "John Wesley," and *from Kingston to Montreal* by such boats, barges or vessels, as might be deemed necessary and proper for the safe navigation thereof.

In the first count of the declaration—after setting out the policy of insurance and its various conditions, (none of which affect the question to be determined), and the shipment of the wheat on board the schooner *John Wesley*, at Port Darlington—the plaintiff averred that the schooner sailed from Port Darlington and arrived with the wheat in good order at Kingston, and there the wheat was loaded on board a barge to be carried to Montreal—being a proper vessel for the safe navigation: that the barge, having the wheat on board, departed from Kingston on her voyage to Montreal, and while on such voyage, and before her arrival in Montreal, by perils, &c., and stormy weather, was stranded and filled with water, and the wheat greatly damaged, and lost. Then followed a variety of averments in reference to the condition of the policy; and a breach in non-payment of the sum insured.

The second count stated the safe arrival of the schooner and wheat at Kingston, and the transfer of it into a barge; and averred that the barge,—after the wheat had been loaded therein, and before sue had completed her ordinary loading, (the plaintiff's wheat not being sufficient to complete her ordinary loading), and without unnecessary delay, and while the barge was proceeding within the waters of the St. Lawrence to finish her loading before starting on the downward voyage from Kingston to Montreal, and before she had started on such downward voyage, was stranded by the perils, &c., as in first count.

The 3rd count stated the shipping the wheat and sailing of the schooner from Port Darlington, as before, and her continuing on her voyage until she arrived at a landing place a short distance (three miles) below Kingston, and on the direct line between Kingston and Montreal—being an intermediate port between Port Darlington and Montreal, known as Port Sidney: that the wheat was there transferred on board a

barge to be therein conveyed to Montreal, such barge being proper, &c., for the navigation of the St. Lawrence : that the barge not being sufficiently laden, according to a certain usage, proceeded with the wheat *up* the stream of the river to Kingston, for the purpose of being completely laden, and whilst so proceeding to Kingston was, by the perils, &c., stranded, &c., and the plaintiff's wheat was damaged and lost. It was then averred that the place at which the plaintiff's wheat was transferred on board the barge, was in fact, together with Kingston, one and the same stopping-place and port, and that by the usage, carriers and persons engaged in the business of shipping, and carrying wheat, &c., were accustomed to go thence to Kingston, and back from Kingston thither, for the purpose of shipping wheat, &c., and so completing their cargoes, at either place, after having taken on board at the other place a partial cargo ; and that according to such usage the aforesaid places were commonly known as one and the same place for shipping and unshipping—concluding as before.

Fourth count, for money had and received.

Pleas.—1. That the loss arose from want of ordinary care and skill—*absque hoc*, that it happened as alleged in the declaration.

2nd.—*Verbatim* the same as the first.

3rd.—That the captain and crew navigating the barge in which the plaintiff's wheat was, took another barge in tow, and thereby the loss was occasioned,—*absque hoc*, that the loss happened as in the first count stated.

4th.—To first count, deviation by the schooner.

5th.—That the wheat was not shipped on board a barge at Kingston, as stated in first count.

6th.—To the second count, same as 3rd to first count.

7th.—To the second count, same as 4th to first count.

8th.—To second count, same as 5th to first count.

9th.—To third count, same as 3rd to first count.

10th.—To third count, same as 4th to first count.

11th.—To third count, denial of the custom alleged.

12th.—Non-assumpsit to the 4th count.

At the trial at Kingston, in May last, before the Chief

Justice, evidence was given that, after a great fire in Kingston, in November, 1839, several persons engaged in the forwarding business erected store-houses for the receipt and warehousing of grain, &c., &c., at different places, without the limits of the harbour of Kingston, but within two or three miles of that city. Among others, Messrs. H. & S. Jones built storehouses about three miles below Kingston, on the bank of the St. Lawrence, where they also erected a wharf and had a landing place, which was commonly known by the name of Port Sidney, though not in fact a port of entry : that for the last twelve years and more vessels have constantly been sent from Kingston to Port Sidney, and vice versâ, to get loads : that no notice has ever been given of this circumstance as special : that the charge for insurance from Kingston to Montreal is the same as from Prescott to Montreal, and no more ; but it appeared that no such question as the present had ever been raised before. It further appeared that the barge was stranded on point Frederick, being struck by a squall in her way up from Port Sidney to Kingston with the plaintiff's wheat on board. This barge had another barge in tow in going up, but cast her off when the squall came on—but it was sworn this caused no injury.

Upon these facts a verdict was rendered for the plaintiff, and £300 damages, subject to the opinion of the court on the facts proved—who were at liberty to order the verdict to be entered for defendant.

The case was argued in Easter Term by *Hagarty*, Q. C., for the plaintiff, and *Cameron*, Q. C., for the defendant.—They cited *Ashley v. Pratt*, 16 M. & W. 471 ; S. C. in error, 1 Ex. 257 ; *Colledge v. Harty*, 6 Ex. 205 ; *Brown v. Tayleur*, 4 A. & E. 241 ; *Marsden v. Reid*, 3 East 572 ; *Gairdner v. Senhouse*, 3 Taunt. 16 ; *Mellish v. Andrews*, 2 M. & S. 26 ; *Beatson v. Haworth*, 6 T. R. 531 ; 1 Phill. on Ins'ce 797 ; 1. Arn. on Ins'ce. 358, *et seq.* ; *Emerigon* on Ins'ce. 282–5.

DRAPER, J., delivered the judgment of the court.

It appears to us that the defendant is entitled to our judgment, according to the express terms of the policy. The

insurance is on the wheat to Kingston, and from Kingston to Montreal, by such boats, barges, or vessels, as might be deemed necessary and proper for the safe navigation of the river.

The word "Kingston" must mean either the city, the township, or the harbour. It would not mean "the port of Kingston," even if the limits of the port were sufficiently extensive to include Port Sidney—a fact however which was not established in evidence. The cases of *Constable v. Noble* (2 Taunt. 403), and of *Payne v. Hutchinson*, referred to in a note to that case, shew this. It is unimportant to enquire whether we could hold the term "Kingston," used in a policy, and for a purpose such as appears in the present case, to refer to anything more than the harbour; for Port Sidney, as was admitted on the argument, is not within the limits of the city, township, or harbour, of Kingston.

There may be ground for holding that the taking the wheat in the schooner beyond Kingston to Port Sidney was a deviation; but granting that it was not, or, if so, that such a defence is not open on these pleadings, still the principal question remains for decision—whether the carrying this wheat back to Kingston, on board the barge into which it had been transhipped, in order to complete at Kingston the loading of the barge, was not a deviation avoiding the policy.

It was certainly following a course of voyage retrograde to that designated in the policy; for, instead of carrying the wheat to Kingston and thence to Montreal, it was carrying it—*first* to Port Sidney, which was nearer to Montreal than Kingston; *secondly*, thence back to Kingston; from which place we may presume it was intended, *thirdly*, to carry it to Montreal, which could not have been done without carrying it again by Port Sidney. The insurer contracted for its safe conveyance to Montreal in one onward course; but according to the plaintiff's argument, this contract would make him liable for the safe transport of the wheat three times over a part of that onward voyage, and, according to what has happened, for a loss incurred in carrying backwards from Montreal instead of onward to it, at a point which it had safely passed once on its way to Port Sidney. We think it clear upon the authorities that this was a deviation, and that

the insurers were discharged, unless there had been shewn a common established and precise usage to do what was done here in the conduct of this navigation, and of the usual mode of forwarding—a usage so established that it must be taken as forming an element in the defendant's contract of insurance. We think the evidence was wholly insufficient to establish this, and are therefore of opinion that the verdict should be entered for the defendant, and the rule for ordering the *postea* to be delivered to the plaintiff should be discharged.

At the conclusion of the judgment the Chief Justice remarked :—

“The only evidence of such custom as was pleaded was, that the Messrs. Jones—having some years ago, for their own convenience, built store-houses three miles below Kingston, on the river St. Lawrence, at the place called Port Sidney—has been very frequently in the habit, after loading their vessels or barges in part at Port Sidney, of going up with them to Kingston, which is a wholly distinct shipping place, and there taking in other goods to complete their cargo. It was not proved that they had done this with goods on board for Montreal which were under insurance only for the voyage down, but I have no doubt that they had often done so, and that it happened not to be stated in evidence only because the question was not asked. It was not sworn, however, that this insurance company, or any other insurers, knew this to be the practice, or that any loss occurring under such circumstances had been knowingly submitted to ; on the contrary, it was distinctly sworn that no loss had occurred of any goods shipped for Montreal while they were being carried upwards towards Kingston in the manner and for the purpose that this wheat was being carried : so that in fact the question of liability under such circumstances had never been raised.

“I do not entertain any doubt that the plaintiff is disabled from recovering on account of the deviation. The loss did in fact occur in consequence of it. The departure from the voyage occurred when the schooner carried the wheat past Kingston. If it had been *there* unloaded into a barge or

vessel for Montreal as was contemplated by the policy, there would have been no occasion or pretence for conveying it back to Kingston after it had passed three miles below it. The departure from the course of the voyage exposed the wheat to the risk of navigation in passing three times over that portion of the river which otherwise they would have had no occasion to pass more than once, and it was in the course of one of these two unnecessary transits that the wheat was lost. It would be idle to contend that these superfluous trips between Kingston and Port Sidney did not increase the risk, if it were material to establish that, for the wheat was actually lost in one of them.

“As to any such usage as was alleged, it is impossible to contend successfully that what the Messrs. Jones, who were merely forwarders on the route to Montreal, found it convenient to do in the mode of conducting their business could constitute a general usage of trade of which these defendants were bound to take notice. They adopted the practice of interrupting the downward voyage by sending their barges up to Kingston to complete their cargo, merely because they happened to have this store-house below Kingston. The policy, for all that appears, was entered into without any reference to them, or to their mode of conducting their business, or without any intention or expectation of their being employed in the matter. The deviation was voluntary, and was such a deviation as was not sanctioned by any provision in the policy. It was occasioned by no exigency, and forms, I think, as clear a case of fatal deviation as can be conceived.

Postea to defendants.

AZENATH HILL V. ALVIN HILL, SYLVESTER HILL, AND HERMAN HILL.

Award—Uncertainty—Unauthorized conditions imposed.

The defendants gave to the plaintiff and her husband a bond in £500, of which one condition was, that if the plaintiff should survive her husband they would maintain her in her house during her life, and supply her with all necessaries. For breach of this condition an action was brought, and *the matters in difference in the cause* were referred at Nisi Prius. Under this reference the arbitrators awarded that the defendants should pay to the plaintiff £500 on or before the 20th of November, 1852, in full of the causes of action for which the suit was brought and of all matters in dispute referred; and *the arbitrators further awarded*, that the plaintiffs should not proceed to enforce the payment of the said £500 as above mentioned, provided the defendants should respectively give to the plaintiff good security on the real estate for the payment to her of the following sums—that is to say, provided S. H. should, *on or before the 1st of December, 1852*, give to the said plaintiff a mortgage on certain land named, securing to her the payment of £250 on default on the following payments, *i. e.* £12 10s. on 1st January, 1853, and from the said 1st January the sum of £12 10s. annually, by quarterly payments, during her life; and provided also, that H. H. should, on the 1st December 1852, secure in like manner by mortgage on certain lands named, £166 13s. 4d., to be paid in case of his default in making certain quarterly payments amounting to £8 6s. 8d. annually; and provided that A. H. should secure, as before, £94 6s. 8d. in case of his default in paying £4 3s. 4d. annually.

The plaintiff declared on this, in an action of debt, as an award “that the defendants should pay to the plaintiff £500 on or before the 20th November 1853.” The defendants denied the award as stated, and in another plea set it out and alleged that it was void on the face of it, as being beyond the authority of the arbitrators.

Held, that the defendants were entitled to a verdict; for there was no absolute claim to the money on the 20th November, as stated in the declaration, but the right of action was suspended until the 1st of December, and would then depend on the execution of the mortgages as directed.

Held, also, that the award was void, as the arbitrators had exceeded their power in giving damages which could not have been recovered in the cause, and in imposing conditions beyond their authority.

Debt on award, setting out in two counts on the award a reference at Nisi Prius in a suit between these parties of all matters in difference in the cause, and stating an award made on the 13th of November, 1852, “whereby it was directed that the defendants should pay to the plaintiff £500 on or before the 20th day of the same month of November.”

Counts were added on an account stated, and for interest.

Pleas by Sylvester Hill—1 *Nil debit* (demurred to); 2, No award (demurred to); 3, same plea to second count, on which issue was joined.

Alvin Hill and Herman Hill pleaded—1, To the first count, *nunquam indebitati*.

2. To the the first count, no award made.

3. The defendants set out the pleadings in the cause referred, shewing what was in issue, and set out the award, stating that no other was made, and relying on the allegation that the award was on the face of it void, as being beyond the submission; and they concluded with special traverse of their being such an award as set out in the declaration. "No award" was also pleaded to the second count. Other special pleas were pleaded which were demurred to, and to the common counts *nil debet* was pleaded.

At the trial at Woodstock, before Burns J., the order of reference and award were proved. An objection was made to the recovery on the ground of variance in stating the award.

The submission by rule of reference at Nisi Prius was shewn to be, as stated in the declaration, *of all matters in difference of the cause*, between the parties. The pleadings in the cause so referred; as set out in the third plea in this cause, shewed, that that action was upon a bond made by the defendants on the 21st July, 1852, whereby they bound themselves to the husband of this plaintiff, since deceased, and to this plaintiff, in £500, with a condition that Alvin Hill should pay to the husband, William Hill, during his life, £5 annually, and should also furnish one-sixth of the keep for two cows and a horse, and one-sixth of the wood necessary for William Hill and his wife: that Sylvester Hill should pay yearly to William Hill £15, and furnish three-sixths of the keep of two cows and a horse, and three-sixths of the wood; and that Herman Hill should pay annually to William Hill £10 during his life and furnish two-sixths of the keep for two cows and a horse, and one sixth of the wood; and further, that if the now plaintiff should survive her husband, then these three defendants should thereafter, during her life, maintain her in the house of her late husband with all necessary meat, clothing, &c.

The declaration in the original action averred, that William Hill died on the 1st of January, 1852, leaving this plaintiff, his wife, surviving him; and assigned, as a breach of the bond of the defendants, that they did not well and sufficiently maintain her, but had refused, though often requested.

The defendants pleaded in that action—1. *Non est factum*; 2, Performance; 3, That they were always ready and willing to perform the conditions, but that the plaintiff refused to be supported in the house of her late husband. On which pleas issue was joined, and there was nothing else in issue.

It was the *matters in difference in this cause* between the parties that were referred at Nisi Prius; and the award made under that reference was what was sued upon in this action—which award, as already stated, was set out in the declaration in this cause as if it were an award simply directing that the defendants should, on or before the 20th November, 1852, pay to this plaintiff £500.

The award produced in evidence upon the trial, after reciting the rule of reference correctly, awarded and determined that the plaintiff “had good cause of action against the defendants, for their non-performance of the condition of the bond for which the said action was brought against them by the said plaintiff, for the recovery of £500, the sum therein mentioned.

“And that the defendants did make the said bond to this plaintiff.

“And that the defendants did not perform their agreement in manner in form, &c., in maintaining and supporting the plaintiff.

“And that the plaintiff did not prevent the defendants from performing the condition, as they had pleaded.”

And the award directed that for non-performance of the condition aforesaid the defendants should pay to the plaintiff or her authorized agent the said debt of £500, on or before the 20th of November then present, (the award being made on the 13th of November) in full of debts or causes of action for which the said action was brought, and of all matters in dispute between them referred to the arbitrators.

And the arbitrators further awarded “*that the plaintiff should not proceed to enforce the performance of the award, or payment of the £500, as above mentioned, provided the defendants should respectively make and deliver good and sufficient security on real estate for the payment to the plaintiff of the several sums of money therein mentioned; that is*

to say, provided Sylvester Hill should *on or before the 1st of December, 1852*, make, execute, and deliver to the said Azenath Hill a good and sufficient mortgage in the law securing unto her the payment of £250, upon his default in making any of the payments of the several sums of money as they should respectively become due to her, at the days thereafter mentioned, and on and covering all that parcel and tract of land and premises situate in West Oxford, being part of lot 19, in the second concession, containing fifty acres, more or less; that is to say, securing to her, the said Azenath Hill, the payment by him, Sylvester Hill, on the 1st of January, 1853, of £12 10s., and from the said 1st of January the payment of £12 10s. annually as long as she should live, by equal quarterly payments of £3 2s. 6d. on the 1st of January, April, July, and October, in each year; and provided also that Herman Hill should on the 1st of December, 1852, secure in like manner by mortgage on certain lands named £166 13s. 4d., to be paid in case of his default in making certain annual payments of £8 6s. 8d. annually, in equal quarterly payments; and provided also that Alvin Hill should secure by mortgage upon certain lands named £94 6s. 8d., to be paid to Azenath Hill in default of his paying her £4 3s. 4d. annually, by equal quarterly payments, during her life.

The award concluded with certain directions as to costs.

The defendants contended at the trial that this award varied so essentially from the award set out in the declaration, that they were entitled to a verdict upon the issues denying that such an award was made as that stated. And they contended, further, that they were entitled to succeed upon the pleas denying the award, on the ground that the award was manifestly bad upon the face of it, as being beyond the submission, which only empowered the arbitrators to dispose of the action pending; and it was therefore as no award.

A verdict was taken for the plaintiff for £517 10s., subject to the opinion of the court.

Eccles shewed cause against a rule to set aside the verdict. He cited *Russell on Arbitration*, 494; *Wood v. Wilson*, 2

Cr. M. & R. 241; *Tomlin v. Mayor, &c.*, of Fordwich, 6 N. & M. 594; *Miller v. De Burgh*, 4 Ex. 809; 1 Salk. 72; *Manser v. Heaver*, 3 B. & Ad. 295; Bac. Abr. "Arbitrament" G.

Cameron, Q. C., and *Galt*, contra cited *Beatty v. McIntosh*, 4 U. C. R. 259.

ROBINSON, C. J., delivered the judgment of the court.

The defendants were entitled, we think, to a verdict in their favour on the pleas which simply denied that such an award was made as that declared upon. The plaintiff declared upon an award which in its terms made the £500 payable absolutely on or before the 20th of November, so that the not paying it on that day would constitute a breach, and give a certain and clear right of action. The award produced clearly suspends the payment of the £500 until after the 1st of December, because whether the plaintiff could ever claim the money or not, was made to depend upon the defendants' failing to perform certain conditions, on or before that day. This was therefore a very material variance, and is equally a variance whether we consider that part of the award which related to the giving mortgages consistent with the terms of the reference, or not, since the defendants might so secure the small annuities if they pleased; and, if they chose to do so, it is plain they would not have to pay the £500. It was wrong, therefore, in the plaintiff to declare upon the award as if it gave her an absolute right to demand the money on the 20th of November; and in another respect the variance was material, for it kept out of view the conditions, which formed part of the award, and a very material part in this sense—that those conditions are clearly such as the arbitrators have no right to impose, under a mere reference of the pending action, in which nothing could be recovered but such damages as it might be right to give for withholding due support from the plaintiff from the death of her husband up to the time of that action being instituted. And on other grounds, also, the exacting such mortgages as are mentioned was altogether beyond the power of the arbitrators; and I take it that the assuming to make such conditions made the award void altogether, as

not being final, and because it is quite evident on an inspection of the whole award, that it could not have been right, and could hardly have been intended by the arbitrators, to make so large a sum as £500 payable upon the contingency of that being done which the arbitrators directed the then defendants should do. The quarterly payments that each had to make were very small, and it was altogether beyond the power of the arbitrators to fasten a penalty of that kind upon all the defendants upon the failure of one of them to pay a few shillings:—besides the consideration, that under a reference of an action in which damages could only be recovered for past defaults, the arbitrators took upon themselves to settle future claims, which that action could not have affected.

It is clear, therefore, that upon the pleas which deny the award, the defendants were entitled to succeed, on the ground that a part was left out which would have shewn the whole void; and upon the further ground, that when the whole award is shewn, it becomes plain that no legal and valid award was made under the submission, which established in the defendants' favour the pleas of no award, whether such pleas were pleaded with the intention to rely upon the variance, or upon the illegality of the award apparent on the face of it.

Rule absolute.

MCDONELL V. THE ONTARIO, SIMCOE, AND HURON
RAILROAD UNION COMPANY.

Proof of by-law—12 Vic. ch. 196, sec. 34—*Claim of interest as on stock paid up.*

The defendants were sued on a by-law, alleged to have been made by them, enacting that all persons who at the time of subscribing should pay up their stock in full should be entitled to interest on the amount of their investment. The defendants' book of by-laws was produced, in which this by-law was written out, but not sealed, and in the margin was written "expunged," signed by the President's initials.

Held, that such proof, even without the entry in the margin, would have been insufficient to shew a by-law; and *semble*, that the claim could only have been supported by an engagement under the corporate seal.

But it was *also held*, that the plaintiff (under the facts stated in the next case) was not a subscriber within the meaning of the alleged by-law, and therefore it was not necessary to determine whether such by-law was proved.

ASSUMPSIT. The first count in the declaration set forth that the defendants, by virtue of 12 Vic. ch. 196, made a cer-

tain by-law in writing, by which it was amongst other things declared, "That all persons who at the time of subscribing shall pay up their stock in full shall be entitled to receive interest on the amount of their investments at the rate of six per cent. per annum, payable half yearly, until the railroad is completed to Lake Huron, deducting such dividends as in the meantime may be declared on the amount of the capital paid up."—That the plaintiff having notice of the by-law, and in contemplation thereof, became and is a subscriber for fifty shares in the stock of the Company, and paid up her stock in full, viz. £250; that the railroad is not complete to Lake Huron, nor has any dividend been declared or paid on the capital paid up: by means whereof the plaintiff became entitled to £15 for two half years' interest. A notice and request to pay, to the defendants, was averred. Breach, non-payment.

Common counts were added for interest, &c.

Pleas—1st. Non-assumpserunt. 2nd. To first count, that there is no such by-law as that set out. 3rd. To first count, that the plaintiff did not become a subscriber of any shares in the stock of the company. 4th. To first count, that the plaintiff did not, at the time of subscribing her shares, pay up the same in full.—Issue on all.

The case came on for trial in May last, at Toronto, before the Chief Justice of the Common Pleas. The same facts were admitted as in the other suit between the same parties, which was tried immediately before this, as to the mode in which the plaintiff acquired her fifty shares and the certificate therefor (*a*). The plaintiff then gave evidence that in the defendants' book of by-laws, which was produced, there is, under the date of the 5th of April, 1851, the following minute—"Draft of by-law by the solicitor, sent and adopted. No. 5. That all persons paying up their stock in full at the time of subscribing shall be entitled to interest." In the margin is written, "Expunged, H. J. B.," meaning Henry John Boulton, who was then president. There was a minute of the same date, "The by-laws Nos. four and five, incorrectly inserted, expunged, and No. five re-written;" signed at foot "H.

(a) See these facts stated, post, page 4, 2734.

J. Boulton." The secretary and treasurer of the company proved that he had not paid interest to any person on certificates of their being shareholders; and that no original subscriber to stock stands in the position of a holder of paid-up stock. The plaintiff was entered as a shareholder, not an original subscriber. There had been interest paid to some parties under special circumstances, not applicable to the plaintiff's case.

Several objections were taken by the defendants' counsel to the plaintiff's recovery; and it was agreed that the verdict should be entered for the defendants, with leave to the plaintiff to move to change it, and to enter it for her on any count in the declaration, if the court should be of opinion the plaintiff was entitled to recover.

In Easter Term the case, on the foregoing pleadings and evidence, was set down for argument.

Wilson, Q. C., for the plaintiff.

Vankoughnet, Q. C., for the defendants.

ROBINSON, C. J., delivered the judgment of the court.

We see no difficulty in this case. The defendants, a corporate body, are charged as being liable upon a by-law alleged to have been made by them, to pay to all persons who at the time of subscribing shall pay up their stock in full interest on the amount of their investment at six per cent. per annum until the road shall be completed to Lake Huron; and the plaintiff sues on this alleged by-law, averring that after the passing of the by-law she became a subscriber, and paid up her stock in full, and so is entitled, under this by-law, to claim interest on her paid-up stock till the road is completed.

The first question presented is, whether there was legal proof of a valid by-law to the effect stated. We think there was not. It is not usual in declaring upon by-laws to speak of them as such, but rather as rules or regulations; but by whatever name the declaration may have called the proceeding which this claim against the corporation for money is founded, it is plain that no claim can be established against them as upon their special undertaking to pay money, until there is shewn an undertaking such as will in law be

binding upon a corporate body. The circumstances of this case exclude all idea of any implied assumpsit. Such a claim as is here sued upon could only arise in consequence of an express engagement, and, as we think, an engagement made under the corporate seal. We take it that regularly all by-laws, and all acts of a special and important nature, to be binding upon the company, must be under seal. But, even if such proof of the alleged by-law could be received as the production of their books in which their by-laws were entered, without shewing any such by-law under seal of the company, and this too for the purpose of charging the company as upon a special agreement to pay money deducible from the terms of that by-law, yet the book here was discredited by such entries upon the face of it in especial reference to the alleged by-law, as must have disabled the court, we think, from treating what was written in that book as evidence of an existing by-law. And, at any rate, the 34th clause of the statute 12 Vic. ch. 196 expressly requires that the by-law shall be under seal, and shall be proved by a copy certified under seal.

But we do not think it of much consequence in this case to determine whether such a by-law was proved as is stated in the declaration, because we think the case failed on other grounds.

We are of opinion that the plaintiff's case, as it appeared in evidence, did not bring her within the terms of the alleged by-law, for she did not shew herself to be a subscriber to the stock of the company within the meaning of the alleged by-law, and as alleged in the declaration. The intention of any such by-law must have been to shew a liberal consideration for the interests of those who had taken stock as subscribers, in order to promote the work; a consideration more liberal perhaps, even in regard to persons so situated, than could well be justified, unless the company could shew the authority of the legislature for making such a provision, for it would seem to bind the company to pay interest upon stock which was producing no profits; but it surely could never have been meant that any but those who could truly be called subscribers to the stock should have the benefit of

such a condition. We think the plaintiff did not shew herself to be a subscriber, in the sense that must have been intended by such a by-law. The contractors themselves, from whom she received a certain quantity of scrip, could not have been regarded as subscribers, and could not have made a claim to interest under the alleged by-law, if they had still retained this scrip. She took by purchase, and was not a person who had originally advanced money by subscription in order to carry on the design, which is clearly what must have been intended. We think the *postea* must go to the defendants.

Postea to defendants (a).

MCDONELL V. THE ONTARIO, SIMCOE, AND HURON RAILROAD UNION COMPANY

Right to demand re-payment of stock, under 16 Vic. ch. 51, sec. 4—Compensation for injury to land,—12 Vic. ch. 196, secs. 10, 14, 16, 20.

The plaintiff sold certain land to Messrs. S. & Co., contractors for the Ontario, Simcoe, and Huron R. R., for the purposes of said road. By their contract Messrs. S. & Co. took a number of shares in the company for which they did not receive scrip at the time, but which they were to pay for in work. The plaintiff received in stock the price agreed on for the land, and the certificate for the shares was given to her by the defendants. The act 16 Vic. ch. 51 was subsequently passed, making material alteration in the charter of the company, and the fourth clause provided that any *original shareholders* in the company (Messrs. S. & Co., and some others *excepted*) might within a given time apply for and obtain *re-payment of any instalment paid by them in cash*, and have their shares cancelled.

Held, that the plaintiff was not within the meaning of this proviso, and could not claim from the company the amount of her shares so obtained.

A railway company was sued for erecting a bridge over and along a public highway, running through the plaintiff's land and crossed by their line of railway running under such bridge, and for the injury thereby occasioned to the plaintiff's land in obstructing the access to the highway, &c. There was however sufficient room left for access at one end of the bridge.

The jury found for the defendants, on the ground that no damage had been sustained, and the court refused to disturb the verdict.

Seemle, however, that there was no right of action, for the act incorporating the defendants bound them to do what was complained of, for the safety and convenience of the public, and made no provision for compensation which could apply in this case.

CASE.—The first count of the declaration stated that before the passing of the 16 Vic. ch. 51, the plaintiff was, and still is, an original shareholder in said company, possessed of fifty shares, which were taken and subscribed in the said stock directly by the plaintiff, and not procured by her by assignment from any other party: that the plaintiff, before the

(a) As to proof of by-law, see Grant on Corporations, page 90.

passing of that act, paid to the defendants, in cash, the full amount of said shares—£250 : that the plaintiff never was a member of the firm of Storey & Co., nor had they, or any contractor on the road, any interest or title in plaintiff's stock : that the plaintiff, after the passing of said act, and within three months after its being passed, being holder of the said stock, applied to the company for re-payment of the moneys paid thereupon, and demanded from the directors the said £250 ; whereupon it became their duty, according to the said act, to repay the same to the plaintiff ; yet the defendants, although a reasonable time for payment has elapsed since the demand, have not repaid the same.

Second count.—That the plaintiff, before and at the committing of the grievances, &c., was and still is possessed of one hundred acres of land in the county of York ; and the defendants were then engaged in making a part of a certain intended railway near to, through and along the plaintiff's land, and across a certain highway leading through certain portions of the plaintiff's land, to which said highway the plaintiff was entitled to have free and easy access from said land, from one to the other part thereof to and fro, for herself, her servants, horses, cattle, and carriages, at all times : yet the defendants, well knowing, &c., and contriving, &c., on, &c., and on divers other, &c., unjustly, and without the leave and license of the plaintiff, and against the will of the plaintiff, made and erected a bridge upon and along the said highway opposite to and through the lands of the plaintiff, over and across the line of railway, of the height of fifty feet, and breadth of sixty-six feet ; and also built upon and over the said highway, heretofore enjoyed by the plaintiff, a certain raised road or highway of the height of fifty feet, and breadth of sixty-six feet, along said highway and through the plaintiff's lands, and kept and continued the same, in order that such raised highway and bridge might be used as a common and public highway, under a false pretence of right and authority.—By reason of which premises the access to and from the land on both sides of the road was greatly obstructed, and the lands are encumbered, and the premises are rendered less valuable and saleable.

The defendants pleaded to the first count—1st, Not guilty. 2ndly, That the plaintiff never was an original stockholder, *modo et formâ*.

3rdly, That the plaintiff did not pay in cash the sum of £250.

4thly, That the plaintiff did not demand re-payment.

To the second count the defendants pleaded not guilty, “by statute.”

The case was tried in May last, at Toronto, before the Chief Justice of the Common Pleas.

The plaintiff put in a certificate, dated 29th of June, 1851, from the defendants to the plaintiff, for fifty shares of £5 each (£250) in the capital stock of the company. It was then admitted that on the 4th of December, 1851, the plaintiff conveyed a part of her land to the defendants, valued at £253 4s. 0d., for the line of the railway—the price of which was paid by the stock mentioned in the certificate put in. And the plaintiff contended that, under the proviso in the 4th sec. of 16 Vic. ch. 51, she had a right to demand repayment of the £250. The proviso is, “that if any of the original shareholders in the company, excepting always Messrs. Storey & Co., the contractors for the said road, the city of Toronto and the county of Simcoe, shall, within three months after the passing of this act, apply for the repayment of any instalment paid in cash by them, or any of them, to the said company, on the shares for which they have subscribed, the directors of the company shall, on demand, refund the amount so paid, and the said shares shall thereafter be considered cancelled.”

The plaintiff's agreement to sell the land for the line of railway to the defendants bore date the 11th of October, 1851.

It was further admitted that Messrs. Storey & Co. were contractors for the road, and were bound by their contract to purchase all land required for the company; that Storey & Co. were original subscribers for a large amount of stock, entered in the company's books as follows: “M. C. Storey & Co., with the privileges of the charter—payments to be made as per contract, 30,000 shares,” which entry was

made by Storey & Co. themselves. They did not get scrip for these 30,000 shares, but the defendants issued scrip from time to time, according to Storey & Co.'s orders, and among others to the plaintiff for fifty shares, part of the 30,000 shares, which fifty shares were charged by defendants to Storey & Co. They were to pay for these 30,000 shares by work, &c., under their contract, and the fifty shares for which the certificate was given to plaintiff were charged by defendants to Storey & Co. as so much stock received by them on the one hand, and they received credit for the sum of £250 paid up by them on the other. The plaintiff was not an original subscriber for shares, but in this way became a shareholder—being the first person to whom any scrip or certificate for these fifty shares was issued, and there being no transfer to her from Storey & Co. under the 36th section of 12 Vic., ch. 196. After giving the certificate there was a separate account opened in the defendants' books with the plaintiff, as a holder of shares paid up. The deed of the 4th of December, 1851, from the plaintiff to defendants, acknowledging the receipt and payment of £253 for the land, was not sealed by the defendants. A great many persons subscribed for stock payable by instalments in cash.

On this evidence a verdict was taken for the plaintiff, by consent, subject to the opinion of the court.

On the second count, it appeared that the plaintiff had a title to No. 28, being a park lot in the township of York; this lot is crossed from east to west by Dundas street, and the defendants' railroad is constructed from south to north over the plaintiff's lot. In order to avoid interrupting the travel over Dundas street, the defendants raised the level of it, beginning at a distance of sixty two links from the eastern limit of plaintiff's lot, and gradually raising the level of the street, by an embankment of solid earth, till it reached where a bridge is built, under which the railway passes, and from the end of the bridge continuing to the western limit of the plaintiff's lot. From the surface of the rail to the surface of the bridge is 18 feet 9 inches high. The embankment is 15 feet high at the highest part, and it extends in some places to a greater width than the original width of Dundas street.

Before this change in the level of Dundas street, that highway was accessible the whole width of the lot (10 chains) on both sides of the street; now the raising of the level of the highway prevents the plaintiff from having access to Dundas street, or across it from the one part of plaintiff's land to the other, excepting for a short distance at the eastern extremity. The plaintiff claimed as damage resulting from this act of defendants the deterioration in value, on the supposition that the plaintiff had laid out the land, immediately adjoining both sides of the street, into building lots, fronting north and south on the street, in which view the injury was prospectively valued much higher than treating the land as at present used for farming purposes only.

On the defence no evidence was offered, but several objections were raised as to the plaintiff's right of action.

The learned Chief Justice told the jury to consider the value of the land if there were neither railroad nor embankment, and also with both; and, if it be deteriorated, to say what is the difference: that so far as other causes had contributed to enhance the value of the plaintiff's land, the plaintiff was entitled to the benefit; but that the plaintiff had no right to have the railway carried below the level of Dundas street, so as to give to the plaintiff an increased value in the land created by the railroad: that the plaintiff was only entitled to damages up to the time of action brought, which limited the question to damages sustained by access to the highway being obstructed. The plaintiff's counsel objected to the charge, and also objected that evidence which he tendered to shew that the defendants might have constructed this railroad to cross Dundas street in such a manner as not to render this bridge and embankment necessary, should not have been rejected.

The jury gave the plaintiff £250 damages on the first count, saying that they considered the stock the same as cash; and on the second count they found for defendants, saying that they found the plaintiff had not sustained damage.

In Easter Term, *Wilson*, Q. C., for the plaintiff, obtained a rule calling on the defendants to shew cause why the verdict rendered for them should not be set aside, and a new trial

granted, the verdict being against law and evidence, and for misdirection.

In the same term, *Vankoughnet*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside as contrary to law and evidence; or why the verdict should not be entered for the defendants on the first count, or on such issues or issue raised thereon, as the court might direct.

Both rules were heard at the same time.

Wilson, Q. C., cited *East and West India Docks and Birmingham Junction R. W. Co. v. Gattke*, 15 Jur. 261; *London and North Western R. W. Co. v. Bradley*, Ib. 639; *Lawrence v. Great Northern R. W. Co.*, Ib. 652; *Glover v. North Staffordshire R. W. Co.*, Ib. 673; *Abraham v. Great Northern R. W. Co.* Ib. 855.

ROBINSON, C. J., delivered the judgment of the court.

With respect to the claim advanced in the first count of the declaration, we have in effect determined that the action cannot be supported under the facts of the case, by the judgment which we have given in the action brought by this plaintiff against the railway company for interest on the amount of the stock claimed by her under a by-law of the company, which declared that interest should be payable to the *original subscribers of stock* while the railway was in progress, upon the amount of stock subscribed by them and paid in. We did not consider that the plaintiff, having acquired her shares as she did by purchase, could be held to come within that provision (a).

A similar question is presented in this case, but it turns, not on the by-law which I have just referred to, but on the construction of an enactment of the legislature, and we must look at the precise language of that enactment. It is contained in the statute 16 Vic. ch. 51, sec. 4. The legislature by that act made many important changes in the charter of the company contained in the former act 12 Vic. ch. 796; so important that they thought it but reasonable to allow any of the original subscribers of stock to withdraw from the

(a) See ante, page 267.

company, and to receive back the money paid in by them, if they should prefer doing so. They accordingly provided "that if any of the original stockholders in the company, excepting always Messrs. Storey & Co., the contractors for the said road, the City of Toronto, and the County of Simcoe, shall, within three months after the passing of this act, apply for the *repayment of any instalment paid in cash* by them, or any of them, to the said company, on the shares *for which they have subscribed*, the directors of the company shall on demand refund the amount so paid, and the said shares shall thereafter be considered cancelled."

The plaintiff, it was proved, obtained her shares not by originally subscribing for them, and the money which she paid in was not paid upon calls made by the directors, but she accepted her shares from the contractors, Messrs. Storey & Co., who were bound to take 30,000 shares of the company's stock, and to pay for them in work upon the railway; and she took fifty of those shares from Messrs. Storey & Co. in payment for land required from her for the railway, which land, as well as all other necessary to be obtained, Messrs. Storey & Co. were bound by their agreement with the company to acquire and pay for, and in the price per mile which they were to be paid this expenditure was estimated and allowed for. To have permitted the contractors, even if they could have done all the work within the three months limited by the fourth clause of the statute, to demand the amount of their stock from the company, as if they had advanced so much in money like the original subscribers, would have been absurd, and would have defeated the very object of that provision in the new statute. It was because the legislature had (as we may suppose), on the prayer of the company, sanctioned a totally new arrangement, of which the existing contract with Messrs. Storey & Co. formed a part, and of which the original stockholders might not approve, that they thought it just to allow the original subscribers the option of withdrawing; and it would have been inconsistent with the object, and would have disturbed this new arrangement, if they had allowed this same option to Messrs. Storey & Co. To prevent any

doubt upon that point the legislature were careful in the fourth clause to except them, and to make it quite clear that the stock granted to them, in anticipation of work to be done, was not to be thrown back upon the company, and its amount in money demanded, as if they had paid in that amount of stock under the old charter, which they never did. Then, as the legislature have by their act expressly directed that Messrs. Storey & Co. are not to be recognized as original subscribers, entitled to the privilege given by the fourth clause, it surely must follow that any one taking by purchase from them, whether in money or in exchange for land, can at least be no more regarded in the light of original shareholders than they were. Such purchaser can stand in no better situation than Messrs. Storey & Co. would have stood in if they had retained the stock; for, as Mr. Vankoughnet argued, if it were held otherwise, it would enable Messrs. Storey & Co. to evade altogether the exception made in the act, by disposing of their stock to others.

This plaintiff, we think it plain, cannot, consistently with the evident intention of the statute, or with its language, be regarded as an *original shareholder* in the company, applying for the "repayment of *any instalment paid by her in cash* to the company on the shares for which she has subscribed." She was not in fact the original shareholder, as regarded those shares; she had subscribed for no stock, and she paid no instalment in *cash* or otherwise to the company.

The jury proceeded on the idea, very correct in general, that giving the land for the stock was the same as money, since it was accepted as money: but that is only a part of the case. We have to look at the evident intention and object of the statute in making this particular provision, and the language and effect of the whole clause, including that part of it which excepts Messrs. Storey & Co. from the privilege which it confers.

We are of opinion that the defendants are entitled to have the verdict set aside which has been rendered for the plaintiff on the first count, and to have a verdict entered in their favor on that count.

The plaintiff, last term, obtained a cross rule for a new trial, on the grounds that the verdict rendered for the defendants on the second count is contrary to law and evidence, and for misdirection.

This part of the case arises out of the complaint made by the plaintiff, that these defendants have been guilty of a wrong in erecting the bridge in question, without first compensating her for the consequential injury which it occasions to her property, by separating one part of her land from the other.

As regards that complaint, we have to consider that the tenth clause of the statute, 12 Vic. ch. 196 gave power to the defendants to do what they did, and in fact requires it from them as a duty. It is therefore no tort. It appears to us that the tenth clause gives damages to all persons whose lands are taken, used or injured, by anything that may be done under authority of that act, which provision, no doubt, will extend to the plaintiff, if her land has been either taken or injured by this company, and if the injury be one which the law will recognize as an injury giving claim to damages. But the tenth clause only provides that it shall be the duty of the company to make satisfaction for damages "*in the manner thereafter mentioned,*" and we must always bear this in mind in disposing of the question.

The fourteenth clause of the act precisely authorizes that to be done which was done in this case, and which is complained of as an injury in the second count: that is, the raising the common highway by an embankment so as to carry it above the railway. It was lawful, therefore, for the company to do this; and more than that, they were bound to do it, for the safety and convenience of the public. There can, therefore, be no wrong to complain of as regards the defendants, unless it be what is alleged, that "they have refused to make compensation *as the act points out;*" for, if the act which authorized the thing to be done had made no provision for compensation, the plaintiff could have no remedy against the company, however justly she might appeal for redress to the legislature which passed the act.

We then come to the sixteenth clause, which seems to authorize a reference to arbitration on account of damages

done to lands, although such lands have not been acquired or taken possession of by the company ; but whenever that clause is to be acted upon there appears to be a necessity for a payment being first made into the Court of Chancery by the company before they take possession ; without this, it is impossible to give any effect to the arbitration clauses. Now the company are not required to pay any sum into the Court of Chancery except for land taken ; and the complaint here is not that the company took any of the plaintiff's land. They did not in fact acquire the highway, that is public property, and was such long before the statute was passed.

So it seems to result in this : it is impracticable to get an arbitration as pointed out by the act, except in a case in which the company, being unable to agree with the proprietors, has paid money into court for land taken, and has entered upon the land. If the arbitration clauses cannot, on this account, apply to a case like the present, then there can in this case be no such arbitration as the statute contemplates ; and if so, it follows that no mode of compensation is pointed out by the act.

Then we have power given by the tenth clause to do the act, making such compensation as the statute, *after that clause*, provides ; and in fact the statute provides nothing that meets the case, and the company are not bound to make compensation in any other way, because the act done was not unlawful but lawful, and it was not merely permitted by law for the benefit of the company, or of the work, but was enjoined and compelled by the statute, for the safety and convenience of the public. The company have not done this for their own purpose or benefit, and there can be no claim at common law on the company for compensation, on account of an act which, by an act of parliament, it is made their duty to do.

The seventeenth clause of the statute provides that when arbitrators have to calculate damages they shall consider, on the one side, the damages and inconveniences to the owner of land occasioned by the railway, and, on the other, the advantage and convenience which may accrue to him from the railway.

The jury here, looking at the whole case, thought there was no damage, and so they found for the defendants; and even if the plaintiff had, under the circumstances, a clear right to sue, we think we should not interfere. The claim for damages does not, at any rate, seem to stand on clear ground. If we suppose a piece of wet land in the middle of a person's lot, where a road crosses it, and that, in order to make a good common road, an embankment should be made in order to raise the road, would an action lie against the persons who did it, in the execution of the duty imposed upon them by law of amending and improving the highway? We should say not, especially if they left, as is done here, a way at the end of the embankment; although it might still be a damage. The jury heard all the evidence, and have found for the defendants in this action of tort, on the ground that there is on the whole no actual damage; and that being so, we do not think we should interfere, even if we thought that the plaintiff could legally recover, which, for reasons we have stated, we do not think she could.

The twentieth clause of the act is badly expressed. It must be taken, we think, to refer to actions which may be brought for things done by persons assuming to act under the statute, but who have illegally done things not permitted by the statute; and making this embankment and bridge were things not merely permitted, but directed to be done.

It results, from the view which we take of this case, that the rule nisi obtained by defendants be made absolute, and the rule nisi obtained by the plaintiff be discharged.

Rules accordingly.

JARVIS V. CAYLEY.

Sheriff's right to sue for price of land sold for taxes—What facts must be set out in the declaration—13 & 14 Vic. chap. 67; 16 Vic., chap. 183—Right of sheriff to maintain assumpsit for the price of goods sold under execution.

The sheriff, as well as the treasurer, may maintain assumpsit for the price of lands sold for taxes; but in such an action it should be expressly averred that the defendant promised to pay for the land and accept a certificate within a reasonable time; and the statement of a general promise to do all things to be performed on his part as purchaser of the lands under the provisions of the statute, was held insufficient, on special demurrer.

Semble, that the sheriff may also recover in assumpsit for the price of goods or lands sold by him under an execution in ordinary cases.

As regards a purchaser of land sold for taxes, it is to be assumed in the first instance that the sale was authorized and regular, and if anything was in fact done which could invalidate it or defeat the title, it is for him to shew it; therefore, in an action against such purchaser for the price, it was held unnecessary to state in the declaration that the collector was unable to collect the taxes, or had assigned any reason why he could not do so—or for what years the arrears were due—or to shew that the notice given was regular in every respect—(and an irregularity in this point would not necessarily invalidate the sale)—or that the lands sold were the lands of non-residents when they were assessed, or when the collectors could by law collect the taxes thereon: but that an averment that they were such when the warrant was delivered to the sheriff was sufficient.

Held also, that the defendant sufficiently appeared to be the highest bidder by an allegation that he bid and offered to take the smallest quantity of the respective lots for the taxes, interest, and expenses due thereon.

This was an action brought by the sheriff of the united counties of York, Ontario, and Peel, to recover the price of lands sold to defendant for taxes.

The declaration set forth that the plaintiff then and still being the sheriff of the said united counties, on, to wit, the 22nd of July, 1852, a certain warrant was directed and delivered to the plaintiff, as such sheriff, by James S. Howard, he then and still being the treasurer of the said united counties, under his hand and seal of office as such treasurer, to be executed in due form of law;—whereby, after reciting that whereas by the accounts rendered to him the said treasurer, by the several collectors of the said united counties, according to the Assessment Act of 13 & 14 Vic., chap. 67, it appeared that the assessments which were imposed upon lands by the several statutes of this province and the by-laws of the municipalities of the said united counties have been suffered to remain in arrear upon the lots and parcels of land contained in the schedule to the said writ attached: and that the said lots or parcels of land,

at the time of the signing and sealing of the said warrants, stood respectively charged with the sums in the said schedule set forth—he, the plaintiff, was commanded in the name of Her Majesty the now Queen to levy the several sums of money in the said schedule mentioned, by sale of such portions of the lands on which the said assessments in the said writ and schedule were then respectively charged as might be sufficient for that purpose, together with the fees allowed by the said act to be levied in the said warrant; he, the said plaintiff, as such sheriff, duly observing the directions of the said act in respect of such sale: and he, the said plaintiff, was thereby further commanded, that whatever moneys he, the plaintiff, should levy by virtue of the said warrant, he should forthwith pay over to him, the said J. S. H., so being such treasurer as aforesaid, as such treasurer:—

That at the time of the delivery of the said warrant to the plaintiff as such sheriff there were past due in arrear and unpaid, upon the several parcels of land mentioned in the said schedule, the several and respective sums of money mentioned in the said schedule for assessments upon the said parcels of land, for assessments imposed upon lands by the several statutes of this province, and the by-laws of the municipalities of the said United Counties: *and that the said parcels of land and each of them were the lands of non-residents.* That after the delivery of the said warrant to him, the plaintiff, for execution in manner aforesaid, and within the then current year, to wit, on the 3rd of August, 1852, he, the plaintiff, as such sheriff, pursuant to the statute, in that case made and provided, after causing the sale hereinafter mentioned,—that is to say, the time and place thereof and the names of all the owners of the respective parcels of land in the schedule to the said warrant mentioned who were then known to the plaintiff, so being such sheriff with the total amount of the taxes assessed on each of the said parcels of land respectively, and where the owners were not so then known, then the total amount of taxes on the several lots, part lots, or parcels of land in the said schedule mentioned,—*to be duly advertised*, according to the said statute, four months before the sale hereinafter mentioned—did, by virtue

of the said warrant, and in execution thereof, in pursuance of the said statute, no person having appeared at the time and place appointed for the said sale to pay the taxes upon the undermentioned lots or any of them, proceed as such sheriff to sell by auction at the court house in the city of Toronto, on the 30th of December, 1852, being the time and place so duly advertized in the said advertisements, among other lands, the parcels of land hereunder mentioned being portions of the lands in the schedule to the said warrant annexed contained, by selling so much of such lands as might be sufficient to discharge the respective taxes thereon with the interest thereon, and the lawful charges incurred in and about such sale and collection of such taxes; and such parts thereof respectively as were then in the judgment of the plaintiff most advantageous for the owners of the said lands, that is to say, &c., (setting out the lands sold, and the sums due upon each parcel.) And upon that occasion the defendant at the said sale bid and offered to take the smallest quantity of the said lots respectively for the said taxes, interest, and expenses due thereon, and became and was the purchaser of portions thereof; that is to say of, &c., (setting out the portions purchased by defendant), all for the several amounts above stated as due upon the said lots respectively, for taxes in arrear, interest, and expenses.

And thereupon the defendant in consideration that the plaintiff had then promised the defendant to carry out the said sale on his part *then promised the plaintiff to do all things to be performed on his part as purchaser of the said lands, under the provisions of the statute in that behalf.* And the plaintiff further says, that ever since the said sale he the plaintiff had been always ready and willing to deliver as such sheriff, a certificate to the defendant of the said several portions of the said lots so sold to the defendant as aforesaid, and pursuant to the statute in that behalf under the hand of the plaintiff as such sheriff, describing the lands so sold as aforesaid, the quantity of the said lands, the sum for which they were sold, and the expenses of the sale thereof, and stating that a deed conveying the same to such purchaser would be executed by him, the plaintiff, as such sheriff,

on the demand of the said defendant at any time after the expiration of three years from the date of such certificate, if the said lands respectively should not be redeemed, of which the defendant hath ever since had notice ; and that although a reasonable time for the defendant to have accepted such certificate. and to have paid for the said parcels of land so purchased by him as aforesaid, at and for the prices aforesaid, had elapsed before the commencement of this suit, yet the defendant hath always neglected and refused, and still doth neglect and refuse to accept the said certificate as to the said parcels of land so purchased by him, or any of them, and to pay the said price therefor, or any part thereof. Damages laid at £100.

The defendant demurred to this declaration, assigning the following causes :—

That this action should be brought by the treasurer of the united counties of York, Ontario, and Peel, and not by the sheriff :—

That it does not appear in or by the said declaration that the collector or collectors of the taxes therein mentioned had been unable to collect the same, or that he or they had assigned any reason why he or they could not collect the same :—

That it is not shewn in or by the said declaration for what year the taxes therein mentioned were in arrear :—

That it does not appear that at the time the lands in the said declaration mentioned were assessed, or at the time the collector or collectors could by law collect the taxes thereon they or any of them were the lands of non-residents—the allegation that they were the lands of non-residents at the time the treasurer's warrant was delivered to the sheriff being insufficient :—

That it does not appear that the treasurer's warrant was delivered to the sheriff within the time allowed by law :—

That it does not appear that the sheriff gave notice of the time and place of sale of the lands therein mentioned as sold to the defendant, once in each month during four successive months, in some newspaper of the county where the lands lie ; nor does it appear that the said plaintiff, as

such sheriff, posted a notice similar to the advertisement required by law to be inserted in some newspaper in the county, in some convenient and public place within the county three weeks before the time of sale, as required by law :—

That it does not appear, in or by the said declaration, that the sale therein mentioned was by public auction, and no other is allowed by law :—

That the said declaration alleges that the lands sold to the defendant were sold as well for interest as for taxes and other charges, whereas there is by law no interest payable on taxes :

That it is not alleged, nor does it appear, that the plaintiff offered or tendered to the defendant the certificate in the said declaration mentioned :—

That it does not appear in and by the said declaration what the defendant's promise was for breach whereof this action is brought :—

That the conditions of the sale are nowhere stated in the said declaration ; and it cannot be gathered from the said declaration, except by conjecture, what promise the defendant made, or what is the cause of action in this cause ; and there is nothing in the said declaration to warrant the breach charged, that the defendant refused to accept the certificate therein mentioned :—

That it is not alleged that the defendant was the highest bidder at the said sale, or what price he bid for the said lands alleged to have been sold to him :—

That the allegation in the said declaration that the defendant bid and offered to take the smallest quantity of the said lots respectively, for the taxes, interest, and expenses due thereon, is unintelligible, and it does not appear at what price or sum he became the purchaser of the lands therein mentioned :—

That it is not alleged in or by the said declaration that the defendant's promise was to accept the said certificate or pay for the said lands within a reasonable time, which should have been averred, to support the breach charged.

M. C. Cameron, for the demurrer, cited *Everard v. Paterson*, 6 Taunt. 625 ; *Lafferty v. Stock*, 3 C. P. 20.

Van Koughnet, Q. C., contra.

ROBINSON, C. J., delivered the judgment of the court.

This case turns upon the statute 13 & 14 Vic. ch. 67. The clauses which more or less bear upon the questions raised, are the 20th, 37th, 38th, 42nd, 43rd, 45th, 46th, 48th, 49th, 50th, 51st, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, and 65th.

It is necessary, however, to consider, in the first place, whether the statute passed in June last, 16 Vic. ch. 183, respecting lands sold for taxes, of which we must take judicial notice, must not affect our judgment. The 8th, 9th, 10th, and 11th clauses seem to apply to all sales made for arrears of which any part accrued under by-laws of the municipal councils, though if the by-laws were not of such a description as is stated in the 8th clause of that act, then this statute will not interfere with the sales that were made in the manner stated in this declaration going into effect as they would have done if this last act had not been passed. It does appear by this declaration that all the sales referred to in it were made for arrears of taxes of which part had been imposed by by-laws, so all of them might, so far as that consideration is concerned, come under the operation of this late act—but whether they are really such as can be effected by that act, depends upon a fact which does not appear in this record—namely, whether the by-law in question in each particular case was of the kind described in the 8th clause of the late act—that is, whether it was subject to certain objections which rendered it illegal.

And upon consideration, as to any of the sales mentioned in this declaration that might come under that statute, our judgment, we think, should not be affected by the enactments contained in it, nor can it be incumbent on us to suspend our judgment in consequence of them, for they seem only to provide that in the cases to which the act does apply the former proprietor should be admitted to redeem on more favorable terms than he could otherwise have done, that is, by paying less money, and in regard to all the sales in question in this action, we do not see that, taking the record and the statute together, there is any apparent reason why we should not dispose of the demurrer. If by reason of the statute having passed, and of any facts being shewn by affi-

davit which do not appear in the pleadings, it should seem that this action ought not to be further proceeded in, the remedy would be by application to stay proceedings.

Then, looking at the demurrer, the first question is, can the sheriff in case of a sale of land for taxes sue for the price. An auctioneer when he sells goods for any principal can sue for the price bid, and unless it be proper that some other person than the sheriff should sue in this case, we see no good reason why the sheriff should not. He is evidently the person to receive the money and to pay it over to the treasurer. The statute shews that to have been intended. The purchaser, I suppose, might pay the treasurer, but not more properly than the sheriff, nor so properly, for the statute provides that the sheriff shall pay to the treasurer the money which he levies, and that he may deduct and detain a per-centage from it for his trouble; and all which implies that the money shall pass through the sheriff's hands.

The intention of the act evidently is, that before the sheriff shall give to the purchaser a certificate of the sale (which confers certain privileges on the purchaser as owner (he shall receive from him the price bid; and no necessity therefore can arise for such an action as this, except where the purchaser (as seems to have been the case here) never calls for his certificate, and takes no steps to fulfil his purchase. In such a case, we think, the sheriff may maintain an action, though we find no mention of such an action in the ordinary case of sale of goods in execution. The sheriff, however, is in such cases chargeable with the debt, when he seizes and sells goods to the amount; and by reason of his special property he may bring actions for any injury done to the goods, or trover for converting them. We think the sheriff may bring assumpsit for the price in cases like the present, for he is required to sell by auction, which it appears also by the record he actually did, and the bid involves a promise to pay him the sum named. We see no necessity for the municipal council suing, if they could do so.

This however is only upon the general question whether the sheriff could sue on such a cause of action. As to the particular exceptions taken, we think, as I have already said

that the action is more proper to be brought by the sheriff than by the treasurer, for that the bid made and accepted may be treated as constituting a contract between the purchaser and the sheriff acting on behalf of the public, as in other cases the auctioneer is considered as entering into a contract with the vendee. There is nothing we think in the exception that the declaration does not shew that the collector was unable to collect these taxes or had assigned any reason why he could not do so. As regards this defendant who bought the land under the writ we must assume in the first instance at least, that those formalities were gone through and that those circumstances existed which made it proper for the warrant to issue. The declaration is sufficient in stating that the sheriff was directed to levy a certain sum, as the amount in arrear upon the several parcels of land respectively at the time of the writ being sealed. This is what the 48th clause requires. It is of no consequence to the purchaser for what years the arrear was charged.

The warrant may or map not have described the lands as being the lands of non-residents. We do not see on the record that it did not. It is averred in the declaration that the lands directed to be sold were the lands of non-residents, and we must assume till the contrary is shewn that the directions of the statute were followed and that the lands were the lands of non-residents so as to subject them to sale for arrears within the meaning of the act. It is not for the purchaser at the sale to put the sheriff to proof of the regularity of all the proceedings of the sheriff, the treasurer, and the council. If anything was in fact done contrary to law, and if the defect were such as would invalidate the sale and defeat the title under it, the defendant should shew it. So as to notice, it will be assumed, *prima facie*, that all was rightly done in that respect; and a failure to give due notice would not necessarily affect the validity of the sale. The former land sale acts shew that the legislature did not mean to make the validity of the sale depend on regularity of the notice. Irregularity of that kind would only be an objection in the mouth of the proprietor whose land was sold, or perhaps on the part of the public who were interested in

having the sale duly advertized. There is the less reason that formal objections should interfere with the validity of the sale when the owner has three years to redeem, as he has under the last act.

In regard to the two next exceptions, we do not understand why they should have been taken, for it is averred in the declaration that the lands were sold by auction, and the statute does provide expressly that interest shall be charged on the arrear of taxes.

It does sufficiently appear in the declaration that the defendant became the highest bidder for the lands mentioned, in the sense which is explained by the declaration, and which is in accordance with the statute, which directs that the sheriff shall sell only so much of the land as may be necessary for making the amount directed to be levied; and we know no other way of carrying that direction into effect than by doing what seems to have been done in this case—namely, by the sheriff putting it to the public, who would pay the sum to be levied for the smallest quantity of the land charged with it. The person who offered to pay the tax for the smallest quantity of land was in fact the highest bidder. This was the system prescribed by the land assessment acts, which had been long in force, and the legislature do not seem to have intended to alter it. Indeed, the legislature by their act, 13 & 14 Vic. ch. 66, have made such a provision as shews that they meant the repeal or alteration of the then existing laws not to interfere with the enforcement of the remedy for past arrears.

The declaration in this case does not expressly aver, as we think it should have done, that the defendant promised to pay to the plaintiff the sum of money which he undertook to pay for the several parcels of land agreed by him to be taken in consideration of his paying the moneys to be levied. It merely states in general terms that the defendant promised the plaintiff to do all things to be performed on his part as purchaser of the land under the provisions of the statute; that he, the plaintiff, has been always ready to give him a certificate, such as the statute entitled the defendant, as purchaser, to demand; that a reasonable time has elapsed, but

that the defendant has refused and still refuses to accept the certificates and to pay the prices or any part thereof. Considering that this is an action of assumpsit we think the plaintiff ought to have averred in express terms that the defendant made the promise for the breach of which he is suing—namely, a promise to pay for the land and accept a certificate within a reasonable time, and then he might have relied upon a promise being implied under the statute, and from the nature of the transaction. The want of an allegation of a promise to do what the defendant is sued in assumpsit for not doing, is expressly pointed out as an exception, and we think it is entitled to prevail upon special demurrer though it is clear enough what is meant to be alleged in substance. The plaintiff may have leave to amend on paying costs.

On the general question whether it is competent to the sheriff to sue in assumpsit for the price of goods or lands sold by him under a writ we have found no express authority, but we think it is consistent with reason and principle to allow such action. It would be unjust and unreasonable that the person bidding off the land should be suffered at his pleasure to abandon the purchase, and no remedy for this appears more convenient or so convenient as to allow the sheriff to sustain an action. The language of the courts too, in the cases of *Williams v. Millington* (1 Hl. Bl. 81) and *Wilbraham v. Snow* (1 Ventr. 52) seems to support this on principle.

Judgment for defendant on demurrer

ELLIOTT V. HEWITT ET AL.

Covenant—Conditions precedent—Pleading.

COVENANT—*Declaration*, that by certain articles of agreement—after reciting that it had been agreed that the plaintiff should make certain improvements in a house for the defendants for the sum of £260,—in consideration that the plaintiff did, in and by the said agreement, covenant with the defendants to make the said improvements before the 15th of May then next ensuing, the defendants covenanted that they would pay for the said improvements at the rate of £50 every three months from the 1st of February then last passed; and it was further agreed that the plaintiff was to allow the defendants the value of the fronts taken out of the said house out of the £260, at a fair valuation by disinterested persons to be chosen by each party; that the plaintiff had always been ready and willing to allow the defendants the value of the said fronts out of the said £260 at a fair valuation, according to said agreement; yet that a period of fifteen months had elapsed since the said 1st of February, and the plaintiff had not paid the several sums of £50 to be paid every three months, amounting to £250, or any of them, or any part thereof.

Held, on demurrer, declaration bad, because it was not shewn that any of the work had been performed, and therefore the defendants could not be called upon to pay; and because it should have been averred either that the window fronts were valued, or that the plaintiff had appointed an arbitrator, and called upon the defendants to do the same.

COVENANT—The declaration stated that, by certain articles of agreement, made between the defendants of the first part, and the plaintiff of the second part, sealed with their respective seals—after reciting that it had been agreed that the plaintiff, in consideration of £260, to be by the defendants paid as thereafter mentioned, should do certain work and make certain improvements on a house belonging to the defendants—the defendants, *in consideration that the plaintiff did, in and by the said articles of agreement*, for himself, his heirs, executors, and administrators, *covenant with the defendants, their heirs, executors, and administrators, to make the said improvements, on or before the 15th day of May next ensuing the date thereof*—did, in and by the said articles of agreement, covenant to and with the plaintiff, that they would pay or cause to be paid to him *for the above mentioned work, at the rate of £50 every three months from the 1st of February then last past*; and it was further agreed between the plaintiff and defendants, in and by the said articles of agreement, that the plaintiff was to allow the defendants the value or worth of the fronts taken out of the said premises so to be repaired, out of the said sum of £260, at a fair valuation of disinterested persons to be chosen by each party; and the plaintiff averred that he had always, since the making of the said agreement been, and still was

ready and willing to allow the defendants the value or worth of the said fronts out of the said sum of £260, at a fair valuation of disinterested persons to be chosen by each party, according to the said agreement; yet that the defendants did not pay or cause to be paid unto the plaintiff the said sum of £260 for the above mentioned works, at the rate of £50 every three months from the 1st of February last past before the making of the said agreement, in this that a long period—to wit fifteen months—had elapsed from the said first day of February before the commencement of this suit, yet the defendants did not nor would pay the several sums of £50 each to be paid every three months from the 1st day of February last past before the making of the said agreement—that is to say, the several sums of £50 to be paid on the first days of May, August, and November respectively in 1852, and on the first days of February and May in 1853, and amounting in the whole £250, or any or either of them, or any part thereof, &c., &c.

The defenbants demurred, “because the plaintiff hath not alleged or shewn in or by the said declaration that he has performed his part of the said agreement, or that there was any good reason or excuse for his leaving the same unperformed, nor is there any good reason shewn why the fronts taken out of the said premises therein mentioned were not valued or the price thereof deducted from the moneys agreed to be paid by the defendants to the plaintiff as in the said articles of agreement provided for.”

Eccles, for the demurrer.

M. C. Cameron, contra, cited *McArthur v. Winslow*, 6 U. C. R. 151; *Pordage v. Cole*, 1 Saund. 320 *b*, note 4; *Brocas's case*, 3 Leon. 219; *Mattock v. Kinglake*, 10 A. & E. 50; *Wilks v. Smith*, 10 M. & W. 355.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that this declaration is insufficient, and that the defendants are therefore entitled to judgment.

All the rules that have been from time to time laid down respecting conditions being or not being precedent must be applied with due attention to the evident meaning of the

parties to be gathered from the whole instrument. No rule seems to be so inflexible as not to be controlled by the intent apparent on the face of the writing.

Now here it is very true that according to the agreement a payment of £50 would fall due on the 1st of May, 1852, (subject however to the question about the allowance to be made for the shop fronts), while the work was not to be completed until a few days after that, viz., on the 15th of May, 1852; and it is a general rule that where the money or part of the money is to be paid on a day named, which will arrive before the work is to be done, then the completing the work will not be taken to be a condition precedent, because there is a reason in such cases to infer that the party for whom the work is to be done looked to his remedy upon the agreement if the other should fail, and was content to run the risk of making him payments in advance. It is also a general rule, that where it is stated in the agreement that the party who is to pay the money undertakes to do so *in consideration of the promise and agreement of the other*, then it is to be considered that the reliance is upon such promise, and the fulfilment of the promise is not to be taken as a condition precedent to the liability of the other attaching.

But in the case before us we see that although it is recited in one part of the agreement, as the declaration sets it out, that it was in consideration of the covenant to do the work that the defendants agreed to pay the money: yet when we come to the most important part, that is, to the very covenant of the defendants on which they are sued—we find that it is stated in these words, “that they did by the said agreement covenant with the plaintiff that they would *pay him for the above mentioned work and materials* at the rate of £50 every three months from the first day of February then last past.

And that the plaintiff was to allow the defendants the value of the fronts to be taken out of the house in making the alteration to be deducted from the £260, at a fair valuation to be made by disinterested persons to be chosen by each party.

Now nothing is plainer and better settled than that when a sum is agreed to be paid, as it is here, *for* certain work to be done, or for certain goods to be delivered, or *for* land to be conveyed, then the party who is to pay may insist upon having the work done, the goods delivered, or the land conveyed before he parts with his money; for the words used in such cases are held to import that such was the intention. And although it is true that the defendants were to pay for such work £260, *at the rate of* £50 every three months, the first of which payments would fall due fifteen days before the work was to be completed, yet when the period has long gone by when the whole work should have been done, and the plaintiff is suing for the whole £260, without for all that appears having moved one step towards the fulfilment of his contract, he is not in our opinion in a condition to deny that his doing the work was a condition precedent, because the defendants had undertaken to pay *for* the work at the rate of £50 every three months, one of which payments might have fallen due while he was going on with the work, if he had proceeded with it. The defendants are now in a situation to say that they will not pay in 1853 for the work which was to be completed in 1852, unless that work has been done.

And, independently of this question altogether, we hold the defendants to be entitled to judgment on demurrer, because the plaintiff has made no averment respecting the shop fronts. He should have shewn that they had been valued, as the agreement had provided, or, if they had not been, that he had at least done what he could towards having them valued by appointing an arbitrator, and calling upon the defendants to do the same. For all we can see they might exceed in value the first payment, and the plaintiff may nevertheless be suing even when he can have no claim to anything on that account.

Judgment for defendants on demurrer.

HENRY V. JOHN LITTLE AND WILLIAM SWITZER.

Promissory Note—Illegal Consideration – Proof of indictment for felony.

To support a plea that a note was given in consideration of forbearance to proceed in prosecution for felony, the particular nature of the charge should be proved.

The production of the original indictment is insufficient to prove an indictment for felony ; but a record must be made up with a proper caption.

This was an appeal from the County Court of the united counties of York, Ontario, and Peel.

The action was brought up on a promissory note for £30, made by the defendants, payable to one William Hayes or bearer, and by the said Hayes delivered to the plaintiff. The defendants pleaded—first, That before the making of the note the said William Hayes had accused and charged the said defendant John Little with having committed an offence, that is to say, the offence of felony, against the form of the statute, &c., and had indicted and caused to be indicted the said J. L. for the said offence of felony ; and had before and at the time of accepting the said note threatened to prosecute the said indictment against the said J. L. for the said offence ; that thereupon it was agreed by and between the said W. H. and the said J. L., that the said W. H. should not prosecute, and should desist from all further prosecution of the said indictment, and should procure the said J. L. to be discharged and released therefrom ; and that the said defendant J. L. and the said other defendant in consideration thereof should make a certain promissory note which the said W. H. should accept and receive of and upon the said defendants for the purpose and on the consideration aforesaid : that thereupon and in pursuance of the said agreement they the said defendants made the said promissory note, on no other account and for no other consideration whatsoever, which said promissory note the said W. H. received from the said defendants : that the said W. H. did then accordingly forbear, and has from thence hitherto forborne to prosecute the said indictment, contrary to law : that there was never any consideration or value for the making of the said promissory note except as aforesaid ; and that the plaintiff, before and at the time when he first became and was the holder of the said promissory note, well knew that the same had been and was so made upon and for the illegal consideration

aforesaid, and took and received the same from the said William Hayes with full notice and knowledge of the said several premises.

Secondly,—Setting out the same agreement to forbear prosecuting the indictment, and averring that the said William Hayes transferred the said note to the plaintiff without any consideration whatever for so doing, and for the mere purpose of enabling the plaintiff to sue the defendants upon the said note ; and that there never was any consideration for the plaintiff being the holder of the said note, but that the plaintiff held the same and sued the defendant for the benefit and on behalf of the said William Hayes.

Thirdly,—That the only consideration for the said note was an agreement by William Hayes, the payee, to forbear proceeding in a prosecution which he had before the making of the said note, to wit on, &c., instituted against the said defendant John Little for felony, against the form of the statute, &c. ; and that the plaintiff afterwards, to wit, on, &c., took and received the said note with full knowledge of the premises.

The plaintiff replied *de injuriâ* to each plea.

At the trial it was proved that the note was given after the parties had come to a settlement of a prosecution at the Quarter Sessions, and that the prosecution was withdrawn with consent of the court. It was also proved that the plaintiff gave value for the note.

The learned judge of the County Court ruled that it was necessary to produce an exemplification or examined copy of the record to prove the nature of the prosecution, and this not being produced he directed a verdict for the plaintiff. A rule nisi was obtained for a new trial on the law and evidence, and for the rejection of evidence, and on affidavit ; and from the decision discharging this rule the defendants appealed.

Dempsey, for the appeal, cited *Chitty on Bills* 81, 83 ; *Bynner v. Regina*, 9 Q. B. 539 ; *Edgecombe v. Rodd*, 5 East 294 ; *Fivaz v. Nicholls*, 15 L. J. (C. P.) 125 ; *Tay. Ev.* 312, 1021, 1023, 1123. *John Bell, contra.*

ROBINSON, C. J., delivered the judgment of the Court.

It nowhere appears in the proceedings that the defendants offered anything beyond parol evidence that Little had been

indicted. Such evidence could not be received. If the original indictment was actually brought into court and tendered as evidence that Little had been indicted, we think the weight of authority is against its reception, and that a record shewing a proper caption should have been made up (a). But that objection would lie only against the proof given in support of the first and second pleas, which are, that Little had been indicted. The third plea, on which issue is joined, is more general in its allegation, stating merely that the consideration for the note was an agreement by Hayes "to forbear proceeding in a prosecution which he had before then instituted."

Admitting, however, that that plea did not necessarily call for any evidence that Little had been *indicted*, because the prosecution might not have been carried that length, yet the plea was in some manner to be proved to a sufficient extent to make it a substantial defence against the note. *Prima facie*, the note must be taken to have been given for a good consideration. It was for the defendant to shew all that is necessary for impeaching it on the ground of illegality. Upon the evidence, as reported in the paper before us, it does not appear that he shewed anything, or offered to shew anything, by other than parol evidence.

Whether the compromise was illegal or not would depend upon the precise character of the charge. Hayes may, for all that appears, have charged that as felony which was no felony, but only such an offence against the person as might, without impropriety, be allowed by the court to be compromised by making satisfaction.

It is every day's experience, that persons even indicted for felonious assaults are convicted of common assault. This may have appeared to the court to have been one of these cases, in which event it might properly have been allowed to be compromised, as the learned judge reports it was, by permission of the Court of Quarter Sessions.

We see no ground on which we are bound to disturb the verdict which, according to the learned judge's report, we may assume to be in accordance with the justice of the case.

Appeal dismissed, with costs.

(a) See *Rex v. Smith*, 8 B. & C. 341 ; *Rex v. Ward*, 6 C. & P. 367 ; *Porter v. Cooper*, *Ib.* 354.

JARVIS V. BROOKE.

13 & 14 Vic. caps. 67 & 69—*Sale for taxes due prior to 1851—Want of due notice of sale, effect of.*

Held, that under 13 & 14 Vic. ch. 67 lands of non-residents could be sold for taxes due prior to January 1st, 1853.

Held, also, that the sale would not be invalid for want of due advertisement thereof, in a newspaper published in the county where the lands were situated, as required by sec. 50.

ASSUMPSIT, by the sheriff of the United Counties of York, Ontario, and Peel, to recover the price of lands sold for taxes.

Plea—Non-assumpsit.

It was agreed between the attorneys for both parties to submit a case upon the points in question for the opinion of the court, and it was admitted—*First*, that on the 22nd day of July, A.D. 1852, the plaintiff, as sheriff of the United Counties of York, Ontario, and Peel, received a warrant from the treasurer of the said United Counties, of which the following is a true copy : “United Counties of York, Ontario, and Peel.—To the Sheriff of the United Counties of York, Ontario, and Peel. Whereas by the accounts rendered to me by the several collectors of the said United Counties of York, Ontario, and Peel, according to the Assessment Act, 13 & 14 Vic. cap. 67, entitled ‘An act to establish a more equal and just system of assessment in the several townships, villages, towns, and cities in Upper Canada,’ it appears that the assessments which were imposed upon lands by the several statutes of this Province, and the by-laws of the municipalities of the said United Counties, have been suffered to remain in arrear upon the lots and parcels of land contained in the schedule hereto attached, and that the said lots or parcels of land stand respectively charged with the sums therein set forth. These are therefore, in her Majesty’s name, to command you to levy the several sums of money therein mentioned, by sale of such portions of the lands on which the said assessments are respectively charged as may be sufficient for that purpose, together with the fees allowed by the said act to be levied on this writ, duly observing the directions of the said act in respect of such sale ; and whatever moneys you shall levy by virtue of this writ you will forthwith pay over to me, as treasurer of the said

United Counties. Given under my hand and seal this twenty-first day of July, 1852. (Signed,) J. S. Howard, Treasurer of the United Counties of York, &c.”:—

That annexed to the said warrant was attached a schedule of the lands in those counties in arrear for taxes, portions of which lands the defendant purchased at the sale herein-after mentioned.

Secondly, That the sale of the said lands for taxes was duly advertized in the *Canada Gazette* and *North American* newspaper, published in the County of York, and took place on the 27th day of December, 1852.

Thirdly, That the defendant attended in person at the sale, and purchased divers portions of such lots to the amount of £64 8s.

Fourthly, That the defendants afterwards refused to pay such purchase money, for the following reasons:—

1. That under the Assessment Act 13 & 14 Vic. ch. 67 the treasurer aforesaid cannot issue a warrant to sell lands upon which taxes were due prior to 1850: that under the act 13 & 14 Vic. ch. 69, the owners of any lots sold by the sheriff at the sale aforesaid can be sued for those taxes due in any year prior to 1850. 2. That the sale of any lands for taxes due in any of the years between 1836 and 1849 would be illegal and void, and the purchasers of such lands could not recover the amount paid with interest, as laid down in 13 & 14 Vic. ch. 67. 3. And that the lands were not advertized in each of the Counties of York, Ontario, and Peel.

The defendant undertook to pay the amount of his purchase if the court should be of opinion that the sheriff's sale was a legal one, notwithstanding the above mentioned objections, and that a rule may issue for that purpose.

VanKoughnet, Q. C., for the plaintiff.

The defendant. in person, *contra*.

ROBINSON, C. J., delivered the judgment of the court.

It is perfectly plain, we think, that under the 46th and 48th clauses of the statute 13 & 14 Vic. ch. 67, the county treasurer was to make a return on the 1st of January, 1851, to the municipal council of all lands in arrear for taxes,

including all arrears up to that period ; and that when the proprietors of any of the lots so charged with arrears were resident within the locality, those arrears were to be inserted on the collector's roll for that year in addition to the taxes for the current year ; and further, that with respect to arrears which in the treasurer's return are charged against the lands of non-residents, the county treasurer was to issue a warrant to the sheriff to make the amount by sale of so much of the land as should be necessary.

The lands sold by the sheriff to this defendant under the warrant are stated in the case to have been at the time of the delivery of the writ to the sheriff the lands of non-residents, and in the warrant it was stated that the lands in the schedule stood respectively charged with the taxes mentioned in the schedule. This, according to the 20th clause of the act, is the manner in which taxes were required to be charged in the case of non-residents ; that is, not against any person, but against the land. The statute 13 & 14 Vic. ch. 69, has nothing to do with the case of lands of non-residents.

As to notice of sale, and whether what is stated regarding it in this case is sufficient to shew the sale valid, it is stated that the time and place of sale were duly advertised in the *Gazette*, and in a newspaper published in the County of York. It is not stated that in the case of any of the lands which lie in another county than the County of York, an advertisement was not also published (as I think it should have been under the 50th clause of the act) in some newspaper in the county in which such land is situated ; but it seemed to be admitted on the argument that there was no advertisement of the sales otherwise than in the *Gazette* and in a newspaper published in the County of York. Taking the fact to have been so, still the sale of such lands would not have been invalid. It would be strange if that should be the effect under the present statute, which allows the owner three years to redeem, when it clearly was not the effect under the former act, which gave but a year after the sale in which to redeem. Whether any defect or informality in regard to notice of sale shall render the sale

invalid, is not stated in this act. In the former Land Sales Act of 8 Geo. IV, it was expressly enacted that it should not; and upon general principles such an omission should not affect the validity of the sale, but should be treated merely as a direction of the statute, which the sheriff is to observe at his peril, being subject to an action at the suit of the party injured if he neglects his duty in this respect. We have decided this on the principles of the common law, where lands have been sold in execution.

The plaintiff is entitled, in our opinion, to the *postea*.

Judgment for plaintiff (*a*).

MILLER v. THOMAS.

False return to fi. fa.—Estoppel against action for—Pleading.

To an action against a sheriff for falsely returning to a *fi. fa.* goods in hand to the value of 5s, and *nulla bona* as to the residue, when enough had in fact been seized to satisfy the writ, the defendant pleaded, secondly, that he did not seize or take in execution *the said goods and chattels* in the declaration mentioned, in manner and form, &c.; and ninthly, by way of estoppel, that the plaintiff requested the defendant to return *nulla bona*, and accepted and acted upon that return, and took out a *ven. ex.* with a full knowledge of the facts.

Held, on demurrer, both pleas good.

This was an action on the case brought against the sheriff of the united counties of Wentworth and Halton for a false return to a *fi. fa.*

The injury complained of in the first count was, that the defendant seized goods enough of the execution debtor to satisfy the whole sum which he was directed to levy, but would not sell the same or any part thereof, and did not make the money or any part thereof, and afterwards falsely returned that he had levied of the debtor's goods to the value of five shillings, which remained in his hands for want of buyers, and that there were no goods to satisfy the residue.

To this the defendant pleaded, in his second plea, that he did not seize or take in execution *the said goods and chattels* in that count mentioned, in manner and form, &c.

In the ninth plea it was alleged, by way of estoppel, that the plaintiff, in order to give the debtor indulgence, by postponing the sale of the goods, requested the sheriff to return *nulla bona*, and accepted and acted upon that return, and took out a *ven. ex.* with a full knowledge of all the facts.

(*a*) See *Jarvis v. Cayley*, ante, p. 282.

The plaintiff demurred to these pleas. The causes of demurrer are sufficiently referred to in the judgment.

Eccles, for the demurrer, cited *Bays v. Ruttan*, 6 U. C. R. 266; *Wright v. Lainson*, 2 M. & W. 739; *Samuel v. Duke*, 3 M. & W. 622; *Lewis v. Alcock*, *Ib.* 188; *Rowe v. Ames*, 6 M. & W. 747; *Pitcher v. King*, 5 Q. B. 758.

Read, contra, cited *Slade v. Hawley*, 13 M. & W. 757; *Scarfe v. Halifax*, 7 M. & W. 288; In the matter of *Harris*, 6 A. & E. 475; *Gosling v. Birnie*, 7 Bing. 339; *Stuart v. Whittaker*, 1 R. & M. 310; *Beynon v. Garrat*, 1 C. & P. 154; *Mullett v. Challis*, 15 Jur. 243.

ROBINSON, C. J., delivered the judgment of the court.

The defendant has succeeded on several pleas not demurred to, which bar the plaintiff's action, so that nothing is at stake but the costs of the pleadings demurred to.

As to the second plea, the plaintiff cannot reasonably be looked upon as complaining that the return was false as regarded the seizure of goods to the value of five shillings. If he had any complaint to make in respect to the alleged five shillings worth of goods, it could only have been that the sheriff could have sold them, and yet falsely returned that there were no buyers; or that he had sold them, and and yet falsely returned that they remained unsold..

The plaintiff makes no such complaint, but charges the defendant with a false return in this respect, that he had seized goods enough to satisfy the whole debt, and had yet returned that he had only levied on goods to the amount of five shillings, and that the execution debtor had no more goods. The injury and complaint are as to the residue above five shillings, for in respect to the five shillings' worth of goods no complaint is made, nor any false return alleged. When, therefore, the defendant answers that he did not take in execution *the said goods and chattels in the said count mentioned* we must understand him, we think, to say, that he did not, as the plaintiff alleges, seize goods enough to satisfy the writ, or seize more than of the value of five shillings, and so that his return of *nulla bona* as to the residue beyond five shillings is not false.

The ninth plea is sufficient. We think it is not open to the charge of duplicity. It was competent for the defendant thus to set out how the return complained of came to be made, and the use that the plaintiff made of it, with the knowledge which the defendant alleges he had, of all the circumstances, and to submit to the court, whether upon these facts he is not estopped from complaining of the return as wrongfully made. It all terminates in the defence of an estoppel *in pais*, which may be pleaded.

Judgment for defendant on demurrer.

SOMMERVILLE V. GREAT WESTERN R. R. CO.

Right of G. W. R. R. Co. to enter upon lands—4 W. IV. ch. 29, secs. 2, 3, 4, 5, 11 ; 9 Vic ch. 81, sec. 26.

Held, that under 4 W. ch. 29, the G. W. R. Co. might enter upon land for the purposes of their road, and could not be treated as *trespassers* for such entry, though they will not be liable to make compensation.

TRESPASS, *quare clausum fregit*. The declaration charged that the defendant on, &c., with force and arms, &c., broke and entered the close of the plaintiff, situate, &c., and then and there forced and broke open the gates of the plaintiff and trod down, injured, and destroyed the grass and corn, and with spades, &c., dug up and subverted, and spoiled the earth and soil, and with cattle, to wit, horses, &c., eat up and depastured other the grass and corn of the plaintiff then growing in his said close, and with the wheels of the carts, waggons, and carriages of the defendants, and their servants, and other persons, tore up, subverted, and spoiled the earth and soil of the said close ; and then broke down and destroyed the hedges and fences of and belonging to his said close ; and then seized and carried away the rails, posts, and boards thereof, to wit, &c., off and from his said close, and converted and disposed thereof to the defendants' own use ; and then cut down, prostrated and destroyed the trees and underwood, to wit, &c., there growing ; and the timber, wood, branches, and bushes thereof coming and arising, to wit, &c., seized, took, and carried away, and converted and disposed thereof to their own use ; and then and there put, placed, laid, threw and cast in upon the said close, divers large quantities of

roots, stumps, wood, stone, and earth, and kept and continued the same there so put, &c., without the leave or license, and against the will of the plaintiff, for a long space of time, to wit, from the respective times of putting, placing, and laying the same as aforesaid until the commencement of this suit, and thereby and therewith, for and during those respective times, greatly encumbered the said close, and hindered and prevented the plaintiff from having the use and benefit thereof; and by reason of the said several premises, the said close of the plaintiff became, and was, and is much impoverished and injured, and deteriorated in value, &c.

The defendants pleaded—except as to the seizing, taking, and carrying away the said property of the plaintiff and converting the same—that long before the said alleged trespasses they were united and incorporated as a company for the purpose of making and maintaining a certain railroad, together with all proper works and conveniences connected therewith; and for the purposes aforesaid the defendants were authorized and empowered to enter into and upon the lands and grounds of or belonging to any person or persons bodies or politic or corporate, and to survey and take levels of the same, or any part thereof, and to set out and ascertain such parts thereof as they should think necessary and proper for making the said railroad, and all such matters and conveniences as they should think proper and necessary for making, effecting, preserving, completing, improving, and using on the said intended railroad, and also to make, build, erect, and set up, in and upon the route of the said railroad, or upon the lands adjoining or near the same, all such works, ways, roads, and conveniences, as the defendants should think requisite and convenient for the said railroad; that the said close in which, &c., was and is adjoining and near the line or route of the said railroad, and was and is requisite and necessary for the making and constructing of certain ways and roads which the defendants required, and which were then requisite and necessary to be used by the defendants in the construction of the said railroad; wherefore the defendants afterwards, to wit, at the said time when, &c., entered in and upon the said close

in which, &c., in order to make and construct the said ways and roads thereon, which were requisite and necessary for the purposes of the said railroad, the said defendants doing as little damage as could be on the said close, in which, &c., and the defendants did thereby, at the said several times, &c., commit the said several alleged trespasses, except as aforesaid, as they lawfully might, &c.

The plaintiff demurred to this plea, for the following causes: That it does not appear in and by the said plea that the railroad therein mentioned, or the line thereof, was ever laid out within the period limited by law for that purpose; that it does not appear thereby that the permission or consent of the plaintiff was ever obtained by the defendants for committing the trespasses complained of, or that by means of agreement, arbitration, or other legitimate cause, compensation for said trespasses was ever ascertained or paid to the plaintiff; and for that the said plea offers no justification for the matters in the introductory part assumed to be justified, nor does it appear that it was requisite for the construction of the road, or any matter connected therewith, that the trespasses should be committed, or that they were committed in the *bonâ fide* execution of the powers granted by the acts of parliament under which they attempt to justify; and that the statement that the said ways were requisite and necessary is vague, ambiguous and uncertain; or that the powers so attempted to be exercised, were exercised in accordance with the provisions or restrictions of the said act.

Eccles for the demurrer.

Cameron, Q. C., contra.

The statutes referred to appear in the judgment. In addition to the cases there noticed, *Turner v. The Sheffield & Rotherham Railroad Co.*, 10 M. & W. 425; *Doe dem Armistead v. North Staffordshire R. W. Co.*, 19 L. T. Rep. 374, S. C. 4 Eng. Rep. 216; were cited on the argument.

ROBINSON, C. J., delivered the judgment of the court.

The question of the sufficiency of the plea turns, we think on the enactments of the original act of incorporation, 4 W. VI. ch. 29, for none of the subsequent acts appear to contain provisions which supersede them.

The statute 9 Vic. ch. 86, sec. 26, makes some provision on the subject of lands required for the purposes of the company; but, we think, so far as regards any question presented by this demurrer, we have still to look to the 4 Wm. IV. ch. 29 for the solution, and the 2nd, 3rd, 4th, 5th, and 11th clauses seem to be those which relate to the subject.

On the one side in the argument, the case of *Ramsden v. Manchester Railway Company* (1 Ex. 723) was relied upon; on the other, that of *Lister v. Lobley* (7 A. & E. 124). We must compare these with the statutes on which they were respectively decided, and then compare those statutes with that under which the defendants were authorized to act.

Having made this comparison, it appears to us (though the 4th and 11th clauses are rather difficult to be reconciled) that the defendants could legally do all that this plea professes to justify, without first having made compensation, either by agreement or through reference to arbitration.

The 11th clause does not say that the company may not enter in order to make surveys or take preparatory steps, or to collect materials, or to make roads for the purpose of the intended railway, without permission first obtained; but that "*the railway shall not interfere with or encroach on any fee simple, right,*" &c., without permission first obtained from the owner.

This seems to include the idea of the railway being finished, and being found, when completed, to interfere with or encroach, &c.

Taking all the clauses mentioned together, the legislature certainly seem to have meant that the company might enter at once, and do whatever is charged in this declaration to have been done, without being trespassers; but that they must, within three months after final award made, pay the sum awarded, or the owner may resume the property. The proprietor has means given him by the act of accelerating the arbitration; and if an award has been made, and the money is not paid within three months therefrom, then the proprietor is entitled, under the fourth clause, to resume possession; but we do not consider that the company would be trespassers in their original entry, which is the gist of this

action, or at least is what is in question under the plea. The plea does not admit, nor does the declaration charge, that the defendants had permanently occupied the plaintiff's land with their railway; but the contrary is to be implied from what is said in the plea, which cannot be held to state a case proper for reference to arbitration under the second clause, or to which the second clause extends for any purpose, though the fifth clause expressly gives the power to do what is charged and admitted to have been done.

Judgment for plaintiff on demurrer.

MAIR V. CULLY AND YOUNG.

Ejectment by mortgagee after foreclosure—his right to mesne profits.

Where a mortgagee brought ejectment after foreclosure, and the defendants appeared to be mere trespassers having no privity with the mortgagor, the plaintiff was held clearly entitled to mesne profits from the date of the foreclosure.

The plaintiff obtained a verdict in ejectment against the defendants, and claimed the mesne profits, having given notice as required by the statute 14 & 15 Vic. ch. 114. His title was that of mortgagee in fee, the mortgage having been foreclosed before the beginning of the ejectment, and he claimed mesne profits from the date of the foreclosure. The jury ascertained the amount at £100, but their verdict was given only for 1s., leave being reserved to the defendant to move to increase the verdict to £100. No privity was shewn to have existed between the tenants, who defended and the mortgagor.

Hagarty, Q. C., obtained a rule nisi accordingly. No cause was shewn.

DRAPER, J., delivered the judgment of the court.

Apparently, the defendants feel no confidence in the objection they raised to the plaintiff's right to the full amount, for no counsel appeared to answer the rule.

There certainly may be cases in which the mortgagee who recovers in ejectment may not be entitled to mesne profits; as, for example, where the mortgagor remaining in possession leases to a tenant, who enters and pays rent to the mortgagor. There the mortgagor may be considered in the light of a

receiver of the rent, or as in some sort a trustee for the mortgagee; and the tenant who, without notice from the mortgagee not to do so, has paid rent to the mortgagor, would, we apprehend, be protected. Even the mortgagor himself cannot, without an express contract, be made liable to pay rent to the mortgagee, for his agreement is to pay interest, not rent; and the same rule would, we apprehend, apply to mesne profits.

But after foreclosure there can be no doubt as to the mortgagee's right; for, according to the doctrine of courts of equity, a foreclosure is considered as a new purchase of the land, and the equity of redemption becomes extinguished in the legal estate, both of which then become united in the mortgagee. However necessary it may be before foreclosure that both mortgagor and mortgagee should join in granting a lease in order to transfer an interest to the lessee, after foreclosure, the whole estate and right being in the mortgagee, no such necessity could exist.

All the cases which have any bearing on this question relate to the continuance of the relation of mortgagor and mortgagee, and tenancies created by the mortgagor while he was either the legal or equitable owner of the estate; and there is a distinction between leases granted by the mortgagor before the mortgagee and those granted after it. In the first case, the mortgagee after default and notice may distrain on the tenant, but cannot evict him; in the latter, he may evict, but cannot distrain, at least until after attornment, or that which would be equivalent to it—*Alchorne v. Gomme*, (2 Bing. 62), *Evans v. Elliott* (9 A & E. 342.)

Even before foreclosure *Littledale, J.*, expresses an opinion that the rents accruing from tenants of the mortgagor might be recovered by the mortgagee as mesne profits from the day when he gave notice of the mortgage to the tenants; and the language of *Parker, J.*, in the same case, is clear to that effect—*Pope v. Briggs* (9 B & C., 257, 258.)

Before foreclosure, therefore, there seems no reason to doubt that as against a tenant of the mortgagor by lease executed after the mortgage, the mortgagee would be entitled to mesne profits, and *a fortiori* against a mere trespasser.

In the present case, for all that appears, these defendants are mere trespassers. No privity is shewn between them and the original mortgagor, or any one lawfully claiming under him; and they would be liable beyond question, even if the mortgage had not been foreclosed, and cannot be less so because the mortgagee has become absolute owner at law and in equity.

We are of opinion the rule should be made absolute.

Rule absolute.

HANNA v. DEBLAQUIERE.

Libel—Privileged communication—"Misappropriation."

Differences having arisen between the Municipal Council of the township of Walsingham and the Port Rowan and Tilsenberg Road Company, of which the plaintiff was a director, the defendant was appointed by a resolution of the Council to act as their attorney, and to examine the books of the company and report to the Council.

The directors were then negotiating with the Trust and Loan Company for a loan of money for the purpose of the road, and the defendant, in the name of the firm of which he is a member, wrote the following letter :

"PORT ROWAN, September 21, 1852.

"*The Commissioners of the Trust and Loan Company, Kingston.*

GENTLEMEN:—We have been requested by three of the councillors of the township of Walsingham to inform you that a loan which they understand the directors of the Port Rowan Company are negotiating with you, is made contrary not only to the wishes of the majority of the township council, but in direct opposition to the well understood wishes of the majority of the stockholders, that the directors are strongly suspected of misappropriation of the funds of the company, that they in vain endeavoured to get an account of the expenditure from the directors, and that the council are now taking measures for compelling a statement; and under these circumstances they would represent that the true interests neither of the township, nor of the Trust and Loan Company, would be forwarded by such a loan being made at present. All of which we can ourselves vouch for.

"Respectfully yours,

"(Signed,) FARMER & DEBLAQUIERE."

It appeared that the directors of the road company had been acting in a manner of which the council, or at least a portion of its members, disapproved; that several of the members of the council had desired to have an account of the expenditure of the road funds, and were refused; that the defendant was told that a majority of the council were opposed to the loan which the directors of the company were endeavouring to effect, and was urged to interpose and prevent it. It was also proved that the affairs of the road company were in confusion, and that the council had good reason for wishing to check the proceedings of the directors.

Held, that the term "misappropriation" might be considered in its gravest sense libellous, but that in this case it was necessary to give proof to the satisfaction of the jury to a malicious intent on the part of the defendant, for otherwise the communication would be privileged, and he would stand excused on account of his particular and legitimate connection with the subject of which he was writing.

CASE FOR LIBEL.—The declaration stated that before the

committing of the grievances, &c., and after the passing of an act of parliament authorizing the same, a certain company had been formed in pursuance of the said act of parliament, entitled "The Port Rowan and Tilsenberg Road Company," and continued to be and was a body corporate for the purposes mentioned therein; and the plaintiff, with four other persons, had been duly appointed, and continued to be and were the directors of the company, and as such directors had, in the discharge of their duty, and on behalf of the said Road company, applied to the Trust and Loan Company at Kingston for a loan of money for the purposes of the said company:—that the plaintiff had always before, &c., conducted himself faithfully and honestly in the execution of the office of director; yet that the defendant, well knowing the premises, but contriving, and wickedly and maliciously intending to injure the plaintiff in his good name, credit, and reputation, and to injure him in the capacity of and as such director, and to subject him to punishment for the offences and misconduct imputed to him by the defendant, as hereinafter stated, on the 21st of September, 1852, in the form of a letter addressed to the Commissioners of the Trust and Loan Company at Kingston, which letter was subscribed in the name of the partnership firm of Farmer and DeBlaquiere, of which firm the defendant then was one, falsely, wickedly, and maliciously did compose and publish of and concerning the said plaintiff, as such director as aforesaid, a certain false, scandalous, malicious, and defamatory libel, as follows:

"PORT ROWAN, Sept. 21, 1852.

"*The Commissioners of the Trust and Loan Company, Kingston:*

"GENTLEMEN:—We have been requested by three of the councillors of the township of Walsingham (meaning, &c.) to inform you that a loan which they understand the directors of the Port Rowan Company (meaning, &c.) are negotiating with you, is made contrary not only to the wishes of the majority of the township council, but in direct opposition to the well understood wishes of the majority of the stockholders, (meaning the stockholders in the said road;) that the directors (meaning the said plaintiff and the said other directors) are strongly suspected of *misappropriation* of the funds of the company (meaning the funds of the said road company;) that they (meaning three councillors) have in vain endeavoured to get an account of the expenditure from the

directors (meaning, &c., and that the council are now taking measures for compelling a statement ; and under these circumstances they would represent that the true interests neither of the township, nor the Trust and Loan Company, would be forwarded by such a loan being made at present. *All of which we can ourselves vouch for.*

“Respectfully yours,

“(Signed,) FARMER & DEBLAQUIERE.”

By means of which premises the plaintiff has been greatly prejudiced in his credit and reputation aforesaid, and brought into public scandal, infamy, and disgrace, and is suspected to have been guilty of the misconduct so imputed to him, &c.

Plea—Not guilty.

At the trial at Simcoe, before Burns, J., it was proved that in August, 1852, Mr. Fuller, as agent of the Port Rowan and Tilsenberg Road Company, was in treaty with the Trust and Loan Company for a loan of money ; that on the 10th of September, 1852, at a meeting of the Municipal Council of Walsingham, a resolution was passed, in which, after reciting that differences had arisen between the council and the directors of the Port Rowan and Tilsenberg Plank Road Company, it was resolved that the council thereby nominated and appointed Henry DeBlaquiere, Esq. (the now defendant), to be their legal attorney, to act for and in behalf of the council in all matters connected with the plank road in which the council has anything to do, and also to examine the books of the said plank road company, and report to the council at some subsequent meeting of the same, of which he is to be duly notified ; and that the clerk do immediately notify him of the same.

At a subsequent meeting, on the 6th of October, 1852, (which, however, was after the publication complained of,) another resolution of the council was passed, in which it was recited that reports had come to the council that “Samuel Hanna, Reeve of the township, (the plaintiff in this suit,) had, without the knowledge and consent of the council, in his official capacity, attached his signature to a document (together with a statement of the amount of stock taken by the municipality in the Port Rowan and Tilsenberg plank road) to be transmitted to the Kingston Trust and Loan

Company, to assist in procuring a loan of money, by conveying to that company the idea that the council was favourable to the effecting such loan; and it was resolved that the Municipal Council of the township of Walsingham, in council assembled, thereby protested against the name of the corporation being used to effect any loan of money by the directors of said Plank Road Company, inasmuch as the council has by far the greatest amount of stock in said road, but have no confidence in the manner in which the directors are conducting the business of the said road; and have therefore appointed Henry DeBlaquiere, Esq., their inspector and attorney, to investigate the books and accounts of said directors; and that the clerk of the council do transmit a copy of this resolution to the said Trust and Loan Company."

The jury found for the plaintiff, and 20s. damages.

Galt obtained a rule nisi for a new trial on the law and evidence, or to arrest the judgment, for the insufficiency of the declaration, and because the letter set forth therein is not a libel. He cited *Taylor v. Hawkins*, 5 Eng. Rep. 253; *Somervill v. Hawkins*, 3 Eng. Rep. 503; *Toogood v. Spyring*, 1 Cr. M. & R. 181; *Richards v. Boulton*, 4 O. S. 95.

Read shewed cause, and cited *Cheese v. Scales*, 10 M. & W. 488; *Wakley v. Healey*, 7 C. B. 605; *Hoare v. Silverlock*, 12 Q. B. 624; *Archbishop of Tuam v. Robeson*, 5 Bing. 17; *Williams v. Gardiner*, 1 M. & W. 245; *The King v. Watson et al.*, 2 T. R. 199; *Rex v. Lambert*, 2 Camp. 398; *The King v. Burdett*, 4 B. & Ald. 131; *Wright v. Woodgate*, 2 Cr. M. & R. 573; *Pattison v. Jones*, 8 B. & C. 578; *O'Brien v. Clement*, 15 M. & W. 437; *Parmiter v. Coupland*, 6 M. & W. 105; *Padmore v. Lawrence*, 11 A. & E. 380, *Jones v. Stewart*, Tay. Rep. 636; *Prentice v. Hamilton*, Dra. Rep. 410; *Johnston v. McDonald*, 2 U. C. R. 209; *Corbett v. Jackson*, 1 U. C. R. 129; *Boulton et al. v. Shields*, 3 U. C. R. 21.

ROBINSON, C. J., delivered the judgment of the court.

We cannot say that there is nothing in the letter complained of which is of a libellous nature—that is, nothing that would under any circumstances support a prosecution for

libel; though I am not clear that there is anything in the letter clearly libellous, except that part which regards an alleged suspicion that the directors of the road company, of whom the plaintiff is one, have *misappropriated* the funds of the company; and as respects that passage of the letter, it does not necessarily convey the imputation of dishonesty. It might mean nothing more than that the directors were spending, or had spent some of the funds in a manner different from that directed by the statute, or in some way contrary to their duty. This might happen in various ways and from various motives; such as from obstinacy, or from an erroneous view of their duty, making a road of a different kind or in a different place from that contemplated. *Misappropriation* does not necessarily mean peculation, though it may mean that; and, being fairly susceptible of such meaning, especially when the assertion is coupled with the words, "the directors are strongly suspected," &c., the plaintiff has a right to complain of the language as being intended to convey that meaning—of which fact he must satisfy the jury.

But the defendant urged as his defence—which no doubt was open to him under the plea of not guilty—that he had written the letter from no malicious intention, but on an occasion, and for a purpose, and under circumstances which made it a privileged communication. It was proved that the directors of the road company were acting in a manner which the township council, or at least a portion of its members, did not approve of; that several of the directors were themselves contractors, which was an impropriety calling for remonstrance, and well calculated to create suspicion. It was proved further that the defendant was an inhabitant of the township, largely assessed in respect to his property there, and therefore materially interested in the measures in question; and further, that he had been invested by resolution of the township council with authority to represent them and to guard their interest in this matter. Then it was shewn that several of the members of the council desired to have an account of the expenditure of the road funds, and were

refused; and that this defendant was told by one of the township council that a majority of the council were opposed to the loan which the directors of the road company were endeavouring to negotiate, and the defendant was urged to interpose in their behalf and to prevent it.

The resolutions passed by the council on the subject, and the facts proved—that the road company is in confusion, having now two sets of directors and two secretaries—tend strongly to produce the conviction that it was not without reason that the township council believed that it was necessary to check the proceedings of the directors of the road company in regard to the road, and that this defendant was doing nothing more than exerting himself in good faith, as agent of the council, and as a matter of business, in placing before the Trust and Loan Company the views and apprehensions which he had been instructed by members of the council were entertained by them in that matter, which was one of considerable public interest.

The defendant's letter imports only that he had been requested by three of the members of the council to convey to the Commissioners of the Trust and Loan Company their impressions. It was proved that an account of the expenditure had been several times refused—that circumstance would in general give rise to a suspicion that there had been something irregular at least in the expenditure; and if the words at the end of the letter "*all of which* we can ourselves vouch for," are fairly to be taken to refer to all the matters stated in the letter, they would still only import that "the directors were *suspected* of misappropriation, &c."

There is the strongest necessity for freedom of action to every reasonable extent in conducting matters of business of this kind. The defendant does not appear to have been acting officiously in a matter which he had nothing to do with; he had a right to make known at the request of the council their sentiments and apprehensions, and also his own as their agent, in regard to this important matter of public concern; and whatever he did honestly and in good faith to that end should not be treated as a malicious libel, otherwise people would be afraid to take such steps as may be necessary

and proper for guarding the interests of the public or their own.

The defendant had a legitimate occasion for corresponding as he did with the Commissioners of the Trust and Loan Company; and the presumption in the first instance should be, that he acted *bonâ fide* in the exercise of the privilege which the law under the circumstances gave him. It might, it is true, be shewn to the satisfaction of the jury that he had maliciously abused his privilege, and made it a pretence and cover for advancing an imputation against the plaintiff and the other directors which he knew to be untrue, or which he had no reason to believe and did not believe to be true; and in that case, supposing the term *misappropriation* to be in its gravest sense libellous, as we think it is, he might be properly found guilty of publishing a false and malicious libel. But it does not appear to us that the jury were given clearly to understand that this was a case of such a description as required proof to be given to their satisfaction of malicious conduct in the defendant, for otherwise he would be guilty of nothing illegal and wrong, on account of his particular and legitimate connection with the subject of which he was writing.

The learned judge seems to have taken the case to be strongly in the defendant's favour on the broader ground that the letter, at any rate, contained nothing that was libellous; telling the jury at the same time that that was a matter of which the law made them the judges. The jury probably looked upon the charge of misappropriation as libellous, and taking that view seem to have supposed that it was decisive of the case; but it was not by any means, for it still remained for them to find, upon careful consideration of all the circumstances, whether the defendant had written what he did in good faith, acting under the trust which had been confided to him, and believing that such dissatisfaction was felt as he expressed, or whether he had merely made a cloak of his agency in the matter, and had written the letter for the malicious purpose of defaming the plaintiff. The damages given are small, but the principle which holds parties safe in making such representa-

tions, where they are made in good faith, and in the due course of business, is one that it is very necessary to uphold and as there are five cases of separate actions, brought by the five directors, upon this same letter, which are all to be governed by the manner in which this case is disposed of, we are of opinion that, for the reason we have stated, the defendant should have a new trial, with costs to abide the event, if he thinks it desirable on his own account to go before another jury upon such a charge as we think should be given.

Rule absolute.

HEMMINGWAY V. HEMMINGWAY.

Application to restrain plaintiff from taking possession of part of the land recovered--Statute of Limitations.

This court will not interpose summarily to deprive a plaintiff in ejectment of the full benefit of his writ, by restraining him from taking possession of part of the premises recovered, except in a very plain case. When, therefore, the defence urged was one under the Statute of Limitations, and unjust under the circumstances, and there had been contradictory evidence, and no misdirection, they refused to interfere.

In this case, at the conclusion of the judgment discharging the rule for a new trial (a), *Connor, Q. C.*, moved for and obtained a rule on the defendant to shew cause why he should not be restrained, by order of this court, from taking possession under the writ of *hab. fac. poss.* to be issued on the judgment, of that part of the land in dispute upon which the house and the orchard stand.

Hagarty, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

Upon the evidence we think we cannot properly make this rule absolute. It was contradictory even as to the exclusive possession by the defendant of the house and orchard for twenty years. Such evidence as was given was left to the jury, and they were distinctly told that there was stronger evidence to shew a possession of that kind as to the house and orchard than as to the rest of the hundred acres claimed, but that there was conflicting evidence to be considered in regard to all. They found a general verdict

for the plaintiff, not expressing that they found the defendant had acquired a title under the Statute of Limitations to any part of the premises. We cannot say that such finding was against the evidence, though undoubtedly the testimony of some of the witnesses would have supported a verdict in favour of the defendant as to the house and orchard, if the jury had given credit to it rather than to the plaintiff's evidence, and had chosen to discriminate in their verdict. Then we have to consider, besides, that the defendant, according to many of the witnesses, both while his father was living and afterwards, spoke of claiming wages from his father for his services on the land for eleven years; and that would shew that he admitted himself to be then working for his father, and dwelling on the land with his permission, his father living all the time on the part of the same homestead. If that was the real position of the parties it would make the possession of the defendant the possession of his father, who held the title.

The attempt by the defendant to make title under the Statute of Limitations against his father's devisee is not to be favoured by the court. We should not interpose in a summary manner to maintain him in possession by assuming, what has not been found by a jury, that the defendant had been allowed by his father to occupy long enough without paying rent to enable him to set his father, or those claiming under him, at defiance. It should only be in a perfectly plain case that we should make such a rule.

Rule discharged, with costs.

MCDONALD V. DORAY.

Ejectment by mortgage—Application to stay proceedings under 7 Geo. II. ch. 20.

To support an application by a defendant in ejectment, under 7 George II. ch. 20, to stay proceedings, on payment of the mortgage money, such defendant must be the person *who has the right to redeem*; and therefore, where the motion was made by the tenant of an assignee of a lease for years from the heir of the mortgagor, the rule was refused.

But, independently of this ground, the facts, as set out in the affidavits, were such as would prevent the court for interfering summarily.

The plaintiff sued in ejectment for the rear part of lot 18, in the 8th concession of Lancaster. At the trial at Cornwall, before Robinson, C. J., the facts proved were these:—

Angus McDougall, being seised of this land in fee, on the 12th of January, 1820, devised it to his grandson Donald McDougall, "to hold during his life, with no power to dispose of it, or run it in debt, but to leave it free of debt to his lawful heir; and to continue so from predecessor to successor for ever." The will contained several other devises, in which the words "lawful issue" were used, not heirs, as in this devise.

The devisor had a son Angus, his eldest son, who died before the devisor, leaving issue Donald, the devisee, who died in 1836 unmarried.

The eldest brother of Angus, the son, was Alexander, who survived Donald, and died in 1840, leaving issue, Angus and another child.

On the 10th of September, 1838, Alexander McDougall executed a mortgage in fee to the plaintiff McDonald upon lot 18, to secure £4 to be paid on the 10th of December following, which deed was registered on the day of the date.

On the part of the defendant a lease was put in and proved, of this land, made by Angus McDougall, eldest son of Alexander the mortgagor, in June, 1848, to the defendant, to hold for seventeen years from the date, at a nominal rent (one shilling), with condition to make improvements. It was not mentioned in the deed in what capacity the lessor was seized. He was examined upon the trial, and swore that he was aware of the mortgage given by his father, but nevertheless, as the land was lying waste, he made this lease. He swore that he had not paid the mortgage, and that his father had died intestate.

On this evidence the learned Chief Justice directed a verdict in favour of the plaintiff as mortgagee, stating that the defendant's counsel might consider whether the judgment could be stayed under the statute 7 George II., ch. 20, by paying the mortgage money into court.

Richards obtained a rule nisi accordingly.

Brough shewed cause and cited *Doe dem. Hurst v. Clifton*, 4 A. & E. 814; *Doe dem. Orchard v. Stubbs*, 6 N. & M. 857; *Goodtitle v. Bishop*, 1 Y. & J. 344.

From the affidavits filed it appeared that on the 11th of February, 1852, the defendant Doray executed an assignment of the term to one John McGillis, who made affidavit that Doray entered under his lease and made valuable improvements, but being indebted to him (McGillis) in £27 10s. assigned the lease to him in security, and had since lived on the place as his tenant. That after the commencement of this suit and since, he, McGillis, offered to pay the mortgagee whatever was due upon the mortgage, but he had wholly refused to accept it;—and that he, McGillis, was still ready to pay up the mortgage with interests and costs.

It was sworn by the defendant's attorney that McGillis was the real defendant in this cause; that he was liable for the costs, having given instructions for this action, which was to have been defended in his name, but was defendant in the name of the tenant, from inability to procure in time the affidavit required by the second clause of the new ejectment act.

In shewing cause against the rule, it was shewn that a notice had been served on the defendant and his attorney, that the plaintiff denied the right of the defendant and of McGillis, or of either of them, to redeem, on the ground that they claimed title or right of possession under a lease made after the mortgage under which the plaintiff claimed, to which lease the plaintiff was not a party; and on other grounds disclosed in affidavits.

There was also an affidavit of Angus McDougall, the heir of the mortgagor, that the mortgage money had never been paid; that the lease made to Doray was fraudulently obtained from him, the deponent, who could not read or write, by a deceitful misrepresentation of its contents; that the person who drew the lease was aware of the mortgage, and that the deponent had by deed of bargain and sale, dated the 6th of March, 1852, sold the premises to the plaintiff for £60, of which part had been paid.

Joseph Doray, son of Doray the lessee, made an affidavit confirming in every respect the statement of Angus as to the fraud practised upon him in obtaining the lease; and that the fraud was contrived by one McGruer for purposes of his own, which were explained.

The mortgage was produced, and also the sale to the plaintiff by the mortgagor of the equity of redemption, which was registered on the day of its date—the 6th of March, 1852. Both were for the whole lot 18—200 acres. The lease was for the north half of the lot.

The plaintiff made an affidavit that the lease was made after the time had expired for paying the mortgage money; that the sale made to him in March, 1852, by the mortgagor, was made *bonâ fide*, and that part of the £60 was paid. He denied any tender being made to him of the mortgage money, and swore that he believed the lease was set up for the purpose of enabling McGilles to plunder the land of its timber, and that Doray had not made the improvements mentioned in the lease.

ROBINSON, C. J., delivered the judgment of the court.

We have considered the affidavits filed on both sides, and have no doubt that we cannot accede to the application.

The case of Doe dem. Hurst v. Clifton (4 A. & E. 815) is decisive against it, on the single ground that the defendant is not the person *who has the right to redeem*, and so does not come within the provision of the statute. It is absolutely necessary that the person who has the right to redeem should be the defendant in the ejectment; and if his tenant or other person holding under him has been served with the process, he must cause himself to be made defendant in his stead, if he contemplates moving under this statute to stay the proceedings.

In the case referred to, the person served as tenant in possession was defending for the benefit of the mortgagor, who was in India, and on whose behalf the application was sworn to be made. But the court said, "We might, perhaps, wish that we had the power which the applicant contends we have; but we have none such, directly or indirectly. The applicant does not answer the requisite which the statute makes essential, and for which there are good reasons."

And *Lawrence, J.*, said: "One condition of the statute is, that the mortgagor should make himself defendant; that is a preliminary without which this court has no jurisdiction."

The words of the Act are, "and who shall appear and become defendant or defendants in such action."

This point being clear against the application, it is unnecessary to look further. When the whole case is stated, as we now see it in the affidavits, the objections to staying proceedings under the statute are numerous and insuperable. For it is not even on behalf of the owner of the equity of redemption that the application is made, but of the assignee of a short term for years, whose tenant it seems is the defendant; and the facts connected with this alleged temporary interest in the estate are sworn to be such as we would not proceed upon summarily, if there were no other legal difficulty in the way. The equity of redemption, too, it is now shewn, has been conveyed to the mortgagor.

Rule discharged.

LEES V. WESTLEY.

Accommodation note discounted before, but paid by plaintiff after action brought, not recoverable—Cost of suit on such note.

It appeared that in May, 1852, the plaintiff, for the defendant's accommodation, gave him his promissory note for £50, which the defendant discounted at the Bank of Upper Canada.—On the 9th November, 1852, the defendant, being sued by the bank, was obliged to pay this note, together with £5 13s. 2d. costs.—On the 10th of September, 1852, the plaintiff gave another note to the defendant for £40, for his accommodation, for the purpose of renewing a previous note of the same nature. This note also came into the hands of the bank and was paid to them by the plaintiff, but not until after the commencement of this suit, though the defendant had discounted and obtained the money on it before.—The plaintiff having sued upon the common counts, for money paid, &c.

Held, that he could recover only the amount of the £50 note; for, first, as to the costs it was not shewn that the suit was defended by him at the request of the defendant, and if it had been, such costs should have been specially declared for, upon an undertaking to indemnify:—and, secondly, as to the claim on the £40 note, the payment made by the plaintiff could not be referred back to the time when the defendant received the money from the bank; in other words, it could not be said that the money was paid by the bank for the plaintiff, and so paid by him to the defendant, before the commencement of this suit.

Held, also, that the fact of the plaintiff having been arrested only for the amount of the first note would be no objection to his recovery on the second, if he were otherwise entitled.

The plaintiff declared in assumpsit on the common counts, for money lent, money paid, money received, and on account stated.

Plea—Non-assumpsit.

In the particulars annexed to the record the plaintiff claimed—

For money lent	£11	12	8
For money paid by him to the attorney for the Bank of Upper Canada in November, 1852, for debt, interest, and costs, in a suit brought by the bank on a promissory note given by the plaintiff to defendant for £50 for defendant's accommodation ...	£56	8	9
And for money received by defendant from Messrs. Seymour and Whitney of Montreal, on or about the 22nd of September, 1852, upon a promissory note for £40, given by plaintiff to defendant to be used in retiring or in part renewing the above-mentioned note	£39	9	3

At the trial at Bytown, before *Robinson, C. J.*, it was proved that on the 13th of May, 1852, the plaintiff gave his promissory note to the defendant for £50, payable in three months, for the defendant's accommodation, to enable him to obtain money by discounting it; and that on the 9th of November, 1852, the plaintiff, having been sued upon the note, was obliged to pay it with interest to the attorney for the bank, together with £5 13s. 2d.

It was further proved by the defendant's receipt in writing, that on the 10th of September, 1852, the plaintiff made and delivered to him another note, payable at three months, for £40, for the defendant's accommodation, and "for the purpose of renewing in part one of the same nature dated the 23rd of May last, and then lying under protest at the agency of the Bank of Upper Canada in Bytown."

The attorney for the bank proved that on the 16th of March, 1853, he had received from the plaintiff £40 19s. 2d., which included interest and protest, in payment of this note, which had been indorsed to Seymour & Co., on whose account the bank collected it. This payment, however, was made to him by the plaintiff after this action was brought (which was on the 9th of November, 1852.)

But in order to entitle himself to sue for it in this action the plaintiff put in and proved a letter from the defendant, dated the 10th of September, 1852, in which he stated to the person to whom it was addressed that he sent him Mr. Lees's note for £40 indorsed by himself (Westley), for the purpose of renewing in part a note which his correspondent had indorsed for him. "I am calling in," he adds, "my outstanding accounts as fast as possible, but not fast enough to

enable me to pay in full all my accommodation paper as quick as it becomes due. Mr. Castle is kind enough to renew what I have in that bank, by my paying a portion in money, which I have done with all but this one, which I was obliged to allow to lie over, as you were not in the place to get your name. Mr. Castle says if I give the within with your signature he will take the balance in money and give me up the other, as was done on the former occasion. Therefore I take the liberty of enclosing it to you with the request that you will do me this one more kindness. Please indorse the note and inclose it to me here, and I will get it on my return from Lancaster, where I am going to-day."

The bank solicitor swore that he thought the defendant had several times obtained delay on the £50 note, which makes it probable that that was the note alluded to in this letter.

The plaintiff had given notice to the defendant of his desire to examine him as a witness, but the defendant did not appear.

It was objected that the plaintiff could not recover in this action the £40 19s. 2d., because the money was not paid by him till after this action was commenced.

2ndly. That he could not recover the costs of the £50 note, because he had not specially declared for them.

The learned Chief Justice allowed the costs to be included in the verdict, reserving leave to the defendant to move to strike them out, if they could not be recovered in this declaration, as he apprehended they could not be.

Upon the other point he told the jury that the plaintiff having paid the £40 note, so that the defendant who had indorsed it could never be made to pay it to any third party, he thought the jury might allow it as money paid for defendant at his request at the time that the defendant obtained the money by discounting the plaintiff's note made at the request of defendant, provided the jury should be satisfied from the defendant's letter that he received the money by sale of the plaintiff's note before this action was brought.

This was done in order to save the necessity of bringing another action, if this verdict could be upheld, but leave was

reserved to the defendant to move or strike out the amount of that note and charges. The jury gave their verdict for the whole of the plaintiff's claim, £111 14s. 11d.

The defendant's attorney filed an affidavit that the defendant was held to bail in this case for £56 only, for money paid for defendant at his request, and that soon after special bail was put in he left the province, and is now in California.

Richards moved to reduce the verdict by striking out one or both of the sums in question.

Hector shewed cause, and cited *Mayfield v. Wadsley*, 3 B. & C. 357; *Jones v. Brooke*, 4 Taunt. 464; *Blyth v. Smith*, 5 M. & G. 405; *Seaver v. Seaver*, 6 C. & P. 673.

Richards contra, cited *Beech v. Jones*, 5 C. B. 696; *Garrard v. Cottrell*, 10 Q. B. 679.

ROBINSON, C. J., delivered the judgment of the court.

We do not think that the fact of the defendant having been arrested for the amount of the first note and interest only supplies any argument against the recovery upon the second note, because the bail to the action would not be prejudiced by the plaintiff being allowed to recover anything beyond the sum sworn to. They would always be relieved by stay of proceedings upon paying the debt sworn to and costs, and are entitled to that relief as a matter of right.

But upon the law of the case, we have no doubt that the items which were admitted at the trial, subject to the opinion of this Court, cannot be allowed, and must be struck out of the verdict.

I was desirous of saving to the plaintiff every opportunity of contending for their recovery in this action, for it was clear enough that all that he claimed is honestly due to him; and it was stated that the defendant has withdrawn to a distant country, which may make it difficult for the plaintiff to proceed in another action.

It is vexatious in the defendant or his attorney to raise objections which cannot relieve the defendant from the costs of this note, and which can only end in driving the plaintiff to sue in another action for moneys which are now clearly due to him.

The exceptions being taken, however, and the points expressly reserved at the trial, we must dispose of them as the law requires we should.

As to the costs of the action against the plaintiff on the first note, I stated at the trial that I apprehended the plaintiff could not recover for them under the circumstances. He made the note for the defendant's accommodation, and relying upon the defendant, who had endorsed it, and procured it to be discounted, taking it up when it should fall due. The defendant failed in this, and left the plaintiff to pay the note. If evidence had been given that the plaintiff had at the request of the defendant defended the action which the bank brought against him upon it, either to gain time or for any other purpose which the defendant had in view, then undoubtedly he would have been liable to the plaintiff for the costs occasioned by the defence; but in the absence of such proof the plaintiff cannot recover, for there is no intimation that he had, or could have had any defence to set up, and he was not at liberty to incur the costs of a fruitless defence, and charge them against the defendant, though it is very probable that it was to suit the convenience of the defendant that the suit was allowed to go on, in the expectation that while it was pending he would be able to procure the money. It was not shewn, however, that the action was defended at Westley's request, and if it had been, the costs could not, as we apprehend, have been recovered upon the common counts, but should have been specially declared for in a count upon an undertaking to indemnify (a).

Then, as to the second claim, upon the note of £40, which the plaintiff made afterwards for the defendant's accommodation, and which the plaintiff had ultimately to pay, and did pay, but not till after this action was commenced—I was in hopes that it might be found possible to admit a recovery for it in this action, upon the ground that the defendant did in fact receive the money upon it by discounting it

(a) See *Bleaden v. Charles*, 7 Bing. 246; *Reynolds v. Doyle*, 2 Scott N. R. 45; *Knight v. Hughes*, M. & M. 247; *Gilbert v. Rippon*, lb. 406; *Asprey v. Levy*, 16 M. & W. 851; *Horton v. Riley*, 13 L. J. (Ex.) 81; *Maxwell v. Jameson*, 2 B. & Al. 54.

before this action was commenced, and it might seem reasonable that the money, though not then paid by the plaintiff, might be treated as paid by the bank for him, and so paid by him to the defendant through the bank. But we think we cannot so distort the facts of the transaction.

The bank merely bought the note, and they took it, not upon the sole credit of the plaintiff as maker, but looking to the defendant and others who had endorsed it. There is this circumstance certainly in favour of the plaintiff, that he having at last taken up the note, though after this action was brought, has put it out of the power of the defendant to object that he may yet be compelled to pay the note to the bank; so that, as far as that goes, we should be safe in referring the payment made by the plaintiff to the time when the defendant himself received the money for the note; but that alone, we apprehend, will not support the recovery as for money paid by the plaintiff at that time. That money did not come out of the plaintiff's pocket, and was not money paid for him to the defendant by the bank. We can find no authority for placing the transaction in that point of view, and therefore must make absolute the rule for striking out of the verdict the costs of the action on the £50 note, and whatever costs were allowed on account of the note of £40.

Rule accordingly.

CONNOLLY V. ADAMS ET AL.

Notice of action—Statement of place where injury committed, and of form of action to be brought.

In this case, being an action of trespass against magistrates for false imprisonment, a question arose upon the sufficiency of the following notice of action:

“ To William Adams and James Johnson, two of Her Majesty's Justices of the Peace, &c.

“SIRS,—You having, on or about the 12th day of October last, as two of Her Majesty's Justices of the Peace, in and for the said United Counties of York, Ontario, and Peel, caused Teddy Connolly, of the township of Albion, in the county of Peel, to be apprehended and unlawfully committed to a certain common gaol or prison called the gaol of the United Counties of York, Ontario, and Peel, in and for the same counties, to be there imprisoned,

and to be kept and detained in prison there, without any reasonable or probable cause whatsoever, for a long space of time—to wit, for the space of ten days then next following—I do therefore, as the attorney of and for the said Teddy Connolly, in his behalf, according to the form of the statute in such case made and provided, hereby give you notice that I shall, at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a writ of summons to be issued out of Her Majesty's Court of Queen's Bench at Toronto, against you, at the suit of the said Teddy Connolly, for the said imprisonment, and shall proceed against you therefor according to law. Dated this 3rd day of February, 1853."

The objections taken were, that it stated no place at which the injury complained of was committed; and that it did not state the form of the action intended to be brought.

James Boulton for the plaintiff.

Dempsey for the defendants.

The Court held the notice to be sufficient, on the authority of the following cases:—*Jacklin v. Fytche*, 14 M. & W. 381; *Breeze v. Jerdein*, 4 Q. B. 585; *Prickett v. Greatrex*, 8 Q. B. 1020; *Jones v. Nicolls*, 13 M. & W. 361; *Martins v. Upcher*, 3 Q. B. 662; *Sabin v. DeBurgh*, 2 Campb. 196; *Cronkhite v. Sommerville*, 3 U. C. R. 129; *Madden v. Shewer*, 2 U. C. R. 115.

DIXIE V. WORTHY.

Promise of married woman.

Where a married woman procured the plaintiff to endorse for her a bill of exchange, promising to indemnify him, and after her husband's death renewed the promise.

Held, that no action would lie, though it was averred that the bill was negotiated for the defendant's own use.

Lee v. Muggeridge (5 Taunt. 36), held to be in effect overruled.

ASSUMPSIT.—The plaintiff declared that the defendant, on, &c., then being the wife of one James Worthy, in consideration that the plaintiff would endorse for her a certain bill of exchange, in order that she might negotiate the same for her proper use and benefit, then promised the defendant to indemnify him therefor, and that he accordingly endorsed the said bill; that while the defendant was the wife of the said J. W., and before and at the time of said promise, a large amount of property was vested in the drawees of the said bill, as trustees of the defendant, for her separate use, and free from the control of her husband; and that she received and

enjoyed certain payments arising from said property for her own benefit : that after the bill had been negotiated the defendant's husband died, and that after his death in consideration of the premises, she promised the plaintiff to save harmless and indemnify him from any loss by reason of his endorsement : that although the said bill was negotiated by the defendant, then being the wife of the said J. W., for her own proper use and benefit, yet she had disregarded her promise, and the defendant was forced to pay the same &c., &c.

Demurrer, because the defendant being a *feme covert* at the time of the drawing of the said bill, is not chargeable thereon.

Cameron, Q. C., for the demurrer.

Vankoughnet, Q. C., contra, cited, *Lee v. Muggeridge*, 5 Taunt. 36 ; *Williams v. Moor*, 11 M. & W. 256 ; *Meyer v. Haworth*, 8 A. & E. 467 ; *Littlefield v. Shee*, 2 B. & Ad. 811.

DRAPER, J., delivered the judgment of the court.

If *Lee v. Muggeridge* (5 Taunt. 36) can be considered as good authority, then the plaintiff is entitled to our judgment. The case has been referred to in several subsequent cases without having been in terms overruled, and has even been spoken of approvingly. Thus in *Littlefield v. Shee* (2 B. & Ad. 811) Lord Tenterden says, that in *Lee v. Muggeridge* "all the circumstances which shewed that the money was in conscience due from the defendant were correctly set forth in the declaration. It there appeared upon the record that the money was lent to her though paid to her son-in-law, while she was a married woman ; and that after her husband's death, she, knowing all the circumstances, promised that her executor should pay the sum due on the bond." But his Lordship adds, "I must also observe that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise, is one which should be received with some limitation ;" and in that case the court refused a rule nisi to set aside a nonsuit—the action being for assumpsit for goods sold and delivered, and the promise stated being, that the defendant would pay when it

was in her power, and the evidence shewing she was a married woman living apart from her husband when she obtained the goods, and that after his death she made the promise declared upon.

Again, in *Eastwood v. Kenyon* (11 A. & E. 448) Lord Denman alludes to *Lee v. Muggeridge*, and expresses surprise that in that and two other cases there was no allusion made to the learned note to *Wennall v. Adney*, (3 B. & P. 249) "which has been very generally thought to contain a correct statement of the law;" but he subsequently says, "The case of *Lee v. Muggeridge* must however be allowed to be decidedly at variance with the doctrine in the note alluded to, and is a decision of great authority;" and his Lordship treats the concluding sentence of the judgment in *Littlefield v. Shee* as "a dissent from the authority of that case where the doctrine is wholly unqualified."

In *Beaumont v. Reeve* (8 Q. B. 483) the defendant's counsel states that *Lee v. Muggeridge* must now be considered as overruled by *Littlefield v. Shee* and other authorities;" and the court in giving judgment expressly approve and uphold the doctrine contained in the note to *Wennall v. Adney*, which Lord Denman states to be at variance with *Lee v. Muggeridge*, and which the later text writers treat as no longer an authority.

As regards the case like the present, of a married woman, *Marshall v. Ratton* (8 T. R. 545) clearly establishes that a *feme covert* cannot contract and be sued as a *feme sole*, even though she be living apart from her husband, having a separate maintenance secured to her by deed; and the incapacity of a married woman to bind herself by contract is very fully gone into. Neither the fact that she derived a personal advantage from the contract, nor that she had a separate maintenance secured to her by deed makes any difference.

In *Boggett v. Frier* (11 East 301) the incapacity of a *feme covert* to maintain an action was fully considered and determined although it was shewn in the replication to a plea of coverture that her husband had years before deserted her, and gone beyond seas, without leaving her any means of support, and that he had not since returned nor been heard

of by her. In *Meyer v. Haworth* (8 A. & E. 467) the action was assumpsit for goods sold and delivered, to which the defendant pleaded coverture, and the plaintiff replied that the defendant was at the time of the contract separated from her husband and living in open adultery; that the plaintiff did not know of the marriage or adultery; and that the defendant after her husband's death, promised to pay. The court held that no consideration appeared for the promise stated in the replication, which was moreover, a departure. *Lee v. Muggeridge* was cited for the plaintiff, but was not commented on by the court. Lord Denman states the effect of the case in this brief judgment: "The record states that goods were supplied to a married woman, who, after her husband's death, promised to pay. This is not sufficient. The debt was never owing from her. If there was a moral obligation, that should have been shewn."

It is impossible in our opinion, to rely upon *Lee v. Muggeridge* after these decisions.

The foundation of the alleged moral obligation set out in the declaration is the assertion that the money obtained for the bill which the plaintiff endorsed, and was obliged afterwards to pay, came the defendant's hands for her own use and benefit. No distinction exists between money or goods obtained by a married woman under such circumstances. *Marshall, v. Rutton* and *Meyer v. Haworth* shew that no legal liability would attach on the married woman for goods sold and delivered to her, though in both cases living apart from her husband, and in one having a separate maintenance. No implied promise would arise in law, and no express promise would be binding; for it is clear that there is this difference between her promise and that of an infant for necessaries—hers is void, his only voidable; and it would be but a natural deduction that hers was not capable of confirmation when she became *discover*t, though his would be when he became of age and the reason seems to be, that when any money or personal chattel comes into possession of the wife during coverture, it becomes the property of the husband. Thus in *Carne v. Brice* (7 M. & W. 183) the property in wearing apparel bought for herself by a wife living with her

husband, out of or money settled to her separate use before marriage, and paid to her by the trustees of the settlement, was held liable to be taken in execution for the husband's debts. *Tugman v. Hopkins* (4 M. & Gr. 389) establishes that money received by the wife who lived apart from her husband, as dividends on stock settled to her separate use, and remaining in her hands at the time of her death becomes the husband's property ; and the late case of *Bird v. Pegrum* (17 Jur. 577) fully recognizes the principle. There by, a marriage settlement, leaseholds of the wife were assigned upon trust to pay or permit the wife to receive the rents and annual profits during her life for her separate use. During coverture the wife received some of the rents from the trustee, and deposited a portion with the defendant, and then died. It was held that an action for money lent would lie by the husband in his own right for this money.

These decisions, therefore, destroy the legal foundation of that moral obligation on which the plaintiff rests his right to recover.

We are of opinion that the defendant is entitled to judgment on this demurrer.

Judgment for defendant.

NICOLLS V. DUNCAN.

Trover—Lien—De injuriâ.

Quære, as to a farrier's right of lien on a horse for services rendered.

Quære also whether a plea of lien in trover is bad on special demurrer.

A replication of *de injuriâ* to such plea is proper.

APPEAL from the County Court of the County of Oxford.

This was an action of trover for a horse. The defendant pleaded a lien for services as a farrier, to which the plaintiff replied *de injuria*. The defendant demurred to this replication, and the plaintiff objected to the sufficiency of the plea.

The learned judge below held the plea to be bad on the authority of *Dorrington v. Carter*, 1 Ex. 566 ; and from this decision the defendant appealed.

Eccles for the appeal.

J. Duggan and *Paterson*, contra, cited *Outwater v. Dafoe*, 6 U. C. R. 256 ; *Andrews v. Adams*, 15 Jur. 149 ; *Hastings*

v. Earnest, 7 U. C. R. 520; Jackson v. Cummins, 5 M. & W. 342; Scarfe v. Morgan, 4 M. & W. 271; Tay. Ev. 553.

See also Bowman et al. v. Malcolm, 11 M. & W. 833; White v. Teal, 12 A. & E. 106; Lane v. Tewson, Ib. 116; Owen v. Knight, 4 Bing. N. C. 54; Mason v. Farnell, 12 M. & W. 683; Jones v. Tarleton, 9 M. & W. 675; Milburn v. Milburn, 4 U. C. R. 179.

ROBINSON, C. J., delivered the judgment of the court.

The judge of the County Court could undoubtedly go into the consideration of substantial objections which appeared against the plea if he chose; but of course such objections alone could be fatal as should prevail on general demurrer.

The learned judge, entertaining objections to the plea, has held it to be bad, and has given judgment for the plaintiff on that ground. It is not stated in the judgment on what account the plea was held to be bad: if because it was an argumentative denial of the plaintiff's right to the possession, that would not be fatal on general demurrer.

The right of lien in such a case as this seems to be subject yet to doubt, and we are not prepared to say that the plea should have been held substantially bad. Looking at the authorities which are cited by the learned judge as decisive against the plea, we apprehend that the objection on which he acted was one of form, and not of substance, if, indeed, there is anything exceptionable in point of form in pleading a lien, especially in an action of trover, notwithstanding it may be given in evidence under the pleas of *not guilty* or *not possessed*.

But we think that any error that may have been fallen into in this respect is immaterial, for that it was proper at any rate, that the plaintiff should have had judgment in his favour on the demurrer, as he now has.

The replication of *de injuria* to a plea of lien in trover appears to have been in numerous cases treated as admissible.

Appeal dismissed, with costs.

KERBY V. THE GRAND RIVER NAVIGATION COMPANY.

Powers of Grand River Navigation Co. to interfere with mills, &c.,—4 W. IV., ch. 13 secs. 2, 3, 5—Pleading—Duplicity.

Declaration in case for wrongfully keeping up certain dams, and for wrongfully increasing the height of the same, and thereby penning back the water of the Grand River, and causing it to flow against the plaintiff's mills and over his premises.

Seventh plea,—That the grievances complained of were necessarily required for the purpose of the navigation of the said Grand River, and were within the limits on that river within the control of defendants; and that the plaintiff's mills were first built after the act incorporating the defendants came into effect,—wherefore the defendants, under the powers given to them by the act, lawfully kept up the said dams, &c.

Eighth plea,—That at the passing of the act incorporating the defendants one Jackson owned a close and mill below that of the plaintiff, from and upon which the said dams were constructed, and had a right and easement appurtenant to said close of penning back the water upon the plaintiff's mill and premises, which right became vested in one Wilks, who had a right by prescription to pen back the water, &c., when the defendants purchased from him; and that because the said dams were within the limits of the act incorporating the defendants, and were necessary for the navigation, the defendants purchased them from said Wilks, and maintained and upheld them, &c.—*quæ sunt eadem*, &c.

Held, on demurrer, seventh plea good, for their act of incorporation authorizes the defendants to do the acts complained of and justified: eighth plea bad, for duplicity in setting up, first, an easement by prescription, and secondly a statutory right.

The plaintiff declared in case against the defendants, for wrongfully keeping, supporting, amending, &c., two certain dams and piers, before then by the defendants wrongfully erected and put up; and for wrongfully raising and increasing the height of the said dams, and thereby penning back the water of the Grand River and causing it to rise and flow against the mills and tail-races of the plaintiff, and over his land and premises.

The defendants pleaded several pleas. *The seventh plea* stated, that the dams and piers at the several times when, &c., and the penning back the waters of the Grand River, and causing small quantities thereof to rise and flow against the said mills, &c., in manner and to the extent in the declaration mentioned, were necessarily required for the purpose of the navigation of the said Grand River, at the town of Brantford, and were situate within the limits on that river within the control and power of the defendants; and that the plaintiff's mills were first built on the close of the plaintiff a long time after the act incorporating the defendants came into effect—to wit, ten years after; wherefore the defendants,

under the powers given to them by the act, kept, supported, amended, &c., the said dams, &c.

Demurrer—That the statute gave the defendants no such powers as those set out in the seventh plea, and that they have no power to injure the plaintiff in the possession of his property without making compensation therefor.

The eighth plea stated that at the time of the passing the act incorporating the defendants one Jackson was seised in fee of a close lower down the Grand River than the close of the plaintiff, from and upon which close the dams and piers in the declaration mentioned had been constructed, and upon which close there was a mill-site and a mill; and at the time of the passing of the act Jackson, as owner and occupier of the said close and mill, was in the actual enjoyment of an easement as appurtenant to the said close—to wit that of penning back the waters of the Grand River by the said dams and piers, and causing small quantities to rise and flow over the plaintiff's close; and at the time the said act came into effect such small quantities of water did overflow the plaintiff's close doing no unnecessary damage:—that all Jackson's estate and interest in the said close, mill, &c., became vested in one Wilks, and that he and all the occupiers for the time being of such close, mill, &c., had, and actually enjoyed at the time of the purchase thereof by defendants, as of right and without interruption, for the full period of twenty years an easement to wit, the dams and piers on the said close and premises now of the defendants, across the Grand River, lower down than the close, &c., of the plaintiff, and of thereby obstructing and penning back the waters of the said river; and thereby the said waters were unavoidably forced upon the plaintiff's close and premises, doing no unnecessary damage; and that because the said close and premises of Jackson, and the dams and piers were within the limits of the act incorporating the defendants, and because the same were necessary to be held, occupied, maintained, and enjoyed by defendants for the necessary purposes of their incorporation, the defendants, in virtue of the said act, purchased the same from Wilks, and because it was necessary for the purpose of the navigation of the river that the said dams

should be maintained, &c., and such navigation could not otherwise be kept free, the defendants did, &c.,—justifying the injuries complained of.

Demurrer—For duplicity, in setting up: 1st, a prescriptive right; 2ndly, a statutory right. That the prescriptive right is not alleged to have been enjoyed for twenty years next before the commencement of the suit; and the prescription being for water for the use of a mill, cannot be set up as a part of the defence, the injury whereof the plaintiff complains being justified during part of the time under a different right.

Cameron, Q.C., for the demurrer cited *The Proprietors of the Kennet and Avon Canal Navigation v. Witherington*, 21 L. J. (Q. B.) 419.

Connor, Q.C., contra, cited *Fenton v. Trent and Mersey Navigation Co.*, 9 M. & W. 503; *Hollis v. Goldfinch*, 1 B. & C. 205; *Rex v. The Commissioners of the Thames and Isis Navigation*, 5 A. & E. 804; *Regina v. the Commissioners of the Thames and Isis Navigation*, 8 A. & E. 901; *Monkland and Kirkintilloch R. W. Co. v. Dixon*, 3 Railw. Cas. 273.

The clauses of the statute bearing upon the question are noticed in the judgment.

DRAPER, J., delivered the judgment of the court.

Upon the whole, after considering the act incorporating the defendants, we are of opinion that the seventh plea is a good defence in substance. The second, third, and fifth sections of the act (2 W. IV. ch. 13) give the defendant power to do such acts as are complained of, and as they justify. The seventh section authorizes the directors to contract, &c., with the owners and occupiers of any land through or upon which they may cut or construct the intended navigation, either for the absolute purchase of so much of the land as they shall require or for the damages to be paid by the company in consequence of the said intended dams, locks, towing paths, and other constructions and erections on his or their respective lands; and provides in case of any disagreement between the directors and such owners or occupiers, for a reference to arbitration. The eighth section, after other provisions not affecting this case, provides, that no part of the lands, &c.,

required by the company shall be taken possession of by them until the price at which the same has been valued, either by agreement or arbitration, shall have been paid to the owner. The present case does not fall within the terms of either of these sections, for the act complained of as injurious to the plaintiff is neither an entry on or a taking possession of any land of his, but it is an act done on other land, and where, by the express terms of the statute, the defendants had power to do what they have done, if necessary for the improvement of the navigation. Then, although the act may produce a consequential damage to the plaintiff, yet it is a lawful act, and the defendants cannot be treated as wrongdoers in a strict exercise of the powers conferred, doing no unnecessary damage, and this is what the plea states. Besides which it is further stated that the plaintiff's mill was not erected until after the act incorporating the defendants was passed, which furnishes an additional reason against the plaintiff's right to recover.

We are of opinion that the eighth plea is bad for the duplicity assigned as a cause of special demurrer: first, in setting up an easement which commenced more than twenty years ago, and tracing it down to the defendants; and, secondly, in setting up the right to do the act complained of under the defendant's act of incorporation. No connexion is shown between the easement asserted to raise water for the use of a mill and the right conferred by statute to improve the navigation; and the easement, though traced by the plea from its alleged commencement, more than twenty years ago, to the defendants, is not alleged to have continued, after it was acquired by them as an easement appurtenant to and for the use of the mill, but as if it had been changed into a right to keep the water raised for the purposes of the navigation.

Judgment for defendants on demurrer to seventh plea, and for plaintiff on demurrer to eighth plea.

CHISHOLM V. TIFFANY.

Dower.

D. S. being seised in fee of certain lands executed a mortgage for 999 years to one Sheldon, who took possession. D. S. afterwards conveyed in fee to W. C.; and after W. C.'s death the premises were sold to defendant at sheriff's sale under a judgment against him. His widow then sued for dower.

Held, that she should have judgment for her dower, with a *cesset executio* during the term;

But *semble*, that in order to authorize *cesset executio* the facts respecting the term should have appeared on record.

And *quære*, if defendant had satisfied the mortgage, and had not taken an assignment of it, or made any provision for keeping it alive, what would have been the plaintiff's right.

This was an action of dower, in which a verdict was taken and damages assessed at £150, subject to the opinion of the Court on the following

CASE.

It is admitted that one David Stewart was seised in fee of the lands and premises mentioned in the declaration in this cause; that prior to the year 1830 the said David Stewart executed a mortgage, for the term of 999 years, of said premises to one Sheldon, who sometime thereafter took possession under the same: that in the year 1837 the said David Stewart executed a deed in fee of said premises to William Chisholm, husband of the demandant: that the said William Chisholm died in the year 1842, and that in the year 1844 the premises were sold by sheriff's sale to the defendant, under a judgment against Chisholm and one against Chisholm's executors: that the annual value of said premises is £75: that judgment by default has been signed in this cause: that Sheldon has been in possession since he took possession: that Chisholm was never in possession, nor yet the defendant: that a formal demand for dower was made about three months ago.

It is consented that a verdict be taken for the demandant with £150 damages for arrear for six years past, subject to be reduced or entered for the tenant, if the Court should be of opinion that, under the above statement of facts, damages should not be recovered in whole or in part.

Read, for the demandant, cited Lady Williams v. Sir Bouchier Wray, 1 P. W. 137; 4 W. IV. ch. 1, secs. 13 & 14.

Vankoughnet, Q. C., contra, cited Parke on Dower, 306.

ROBINSON, C. J., delivered the judgment of the court.

We take it to be quite clear that upon the facts stated the demandant cannot be entitled to substantial damages for the detention of her dower, on account of the long mortgage term which, for all that appears in this case, is still subsisting.

She should have judgment for her dower, with a *cesset executio* during the term. But it seems to me to be a difficulty that the facts respecting the term for years do not appear in the record, as they did in *Bates v. Bates* (1 *Ld. Raym.* 326), being found by special verdict. There is nothing on record on which to ground the stay of execution.

Then should there be any damages, even nominal, considering what facts were admitted? If the demandant gets any damages, she gets costs also, which would not seem to be right, when she is not entitled to the rents or profits—except that her dower in the reversion might have been at once assigned to her, without driving her to sue.

We cannot act here upon what we may have heard proved in former proceedings respecting this property, not in this Court, but while sitting as Judges in Appeal from the Court of Chancery (*a*); and if we could, according to my recollection of that case, I do not see what claim the widow can have to substantial damages (*b*). The widow in this case has not removed the term out of the way by paying up the mortgage. If the term has been purchased by Tiffany, but without his taking an assignment of it, or rather making any provision for keeping it alive, the mortgage has then been satisfied, but not by the widow; and the question would be, whether because it had been allowed by Tiffany to merge in the fee which was vested in him, the widow is therefore entitled at once to execution for her dower, and to damages for detention, and from what time.

If we could notice the transaction respecting Tiffany's purchase of the mortgage term, of which nothing appears in this case, and if the facts be as I believe they are, the effect might be that, the term having merged, there would be nothing to hinder the widow from obtaining her dower presently—*i. e.*, nothing *in law*. The right to damages

(*a*) See 3 *Chy. Rep.* 655.

(*b*) See *Co. Litt.* 208 *a*, note 1.

might depend upon other considerations. Before she could justly claim damages she should have paid at least one-third of the sum necessary for extinguishing the term, or a sum ascertained by computation upon the value of her life; and *quære*, should not that amount (if all the facts were disclosed) be charged against the annual value of the estate in awarding her damages? (a).

REGINA V. DAVIS ET AL., AND REGINA V. FRALICK.

Niagara Falls Ferry—Obstruction of Road to—Ordinance Department.

Held, that under the facts stated in this case, the defendant being the lessee of the Ordnance Department, had no right to obstruct the road leading to the Niagara Falls ferry, and that he was guilty of a nuisance in so doing.

The first of these cases was an indictment for riot and assault upon Adam Fralick. The second was an indictment against the same Adam Fralick for nuisance in obstructing a highway.

In the latter indictment it was charged that the defendant on the 1st of June, in the 15th year of the reign of the present Queen, in the County of Welland, in a certain road there, being the Queen's common highway, and for all the liege subject of our Lady the Queen, with their horses, coaches, carts, and carriages, to go, return, &c., at their free will and pleasure; unlawfully and injuriously did make, set up, erect, and place a certain gate in, upon and across the said highway, and unlawfully hath continued and kept the same so erected, &c., thereby obstructing the said highway, &c.

The defendant in the case for riot, pleaded guilty, and so also did the defendant in the prosecution for nuisance, and both cases were reserved for the opinion of this court on the following statement of facts, signed by the counsel for the Crown and for the defendants.

"It is admitted that the defendant Fralick is lessee of the Ordnance Department of the Niagara Falls ferry, with the road at the foot of the ferry hill leading thereto: that the Ordnance Department have always exercised the right of ownership thereof: that this is an open road which has

(a) See Roper on Husband and Wife, 371; Lady Dowager Lindsey v. Lord Lindsey, 1 Salk. 261.

been travelled to the ferry for a period of upwards of twenty years, without hindrance or obstruction of any kind, but there never has been statute labour done upon it, though during all that time the lessees under the Ordnance Department, by the terms of their agreement with that board, were obliged to and did keep the road in repair ; that after the defendant obtained his lease, he put a gate across the road within the part of the ground leased to him with the ferry, which gate he closed whenever he thought proper, so as to prevent carriages going farther than that gate upon the road to the ferry ; and the erection of that gate and the closing thereof is the nuisance complained of.

“ The lease given by the Ordnance to the defendant Fralick, was made on the 1st of December, 1847. It purports to demise to him for seven years from the first of December, 1846, “ all that certain parcel or tract of land and premises, being part of the Ordnance reserve, at or near the Falls of Niagara, in the township of Stamford, containing *one rood and twenty-two perches*, more or less, which is coloured red in a sketch annexed to the lease, the rent to be £10, payable half yearly.” The lessee covenants that he will not cut down or destroy any trees, remove rocks, or make any excavations, except where necessary *for the improvement of the road*, and then under the sanction of the senior officer of Royal Engineers in the district. The lease to be determined at any time by either of the parties giving three months’ notice in writing, or without such notice on paying three months’ rent.”

Vankoughnet, Q. C., for the Crown.

Cameron, Q. C., for the defendants.

ROBINSON, C. J., delivered the judgment of the court.

Whatever might be our opinion on this state of facts in regard to Fralick’s right to put up the gate, it would not follow that the opinion upon that point would be decisive upon the propriety of the conviction of riot ; for if the gate were clearly a nuisance, the defendants in the indictment for riot and assault might have proceeded to abate it in a manner so violent and outrageous as fairly to subject themselves to a

prosecution for riot. It seems, however, to be understood that our conclusion upon the question of right will dispose of both the cases.

If the question of Fralick's right to erect the gate complained of, depended upon the extent of the estate or authority which he can claim under his lease, which we do not think it can, we have not the facts before us which are necessary for enabling us to form an opinion. The ground leased to Fralick, is no otherwise described than by reference to a small sketch annexed to the lease, which has no course or distance marked upon it, so that we do not see by it either the length or breadth of the tract, or the position of the alleged road. In fact, without the aid of a very precise knowledge of the ground, which we cannot be supposed to have judicially, we could not make out anything certain from it. Then, before we can determine what right Fralick could exercise under his lease from the Ordnance, we must know what it was that the Ordnance could legally demise. We ought to be informed what is the limit towards the river Niagara of the grants made by the Crown fronting towards or upon that river, and also what has been done by the Civil government, or by the Ordnance, in relation to any land that may intervene between the river and the eastern boundary of the lots granted in front of the township of Stamford. It was chiefly upon the effect of the lease given to Fralick by the Ordnance that the case was argued before us, and on that account, I have stated what facts we ought to be in possession of, before we could give any weight to such arguments. But we really do not see how any considerations of that kind can be material.

The question must turn exclusively, we think, upon whether there was a common public highway in the locality spoken of, and whether this highway was unlawfully obstructed by the defendant Fralick, a question that may be, and that we think must be, altogether independent of any consideration of what Fralick could take by his lease from the Ordnance.

We gather from the written admissions placed before us, that whatever may really be the fact in regard to the right of the Ordnance Department, it is admitted, for the purpose

of disposing of these cases, that the Ordnance Department have always exercised the rights of owners of the ferry and of the road leading to it; that the road had been for more than twenty years used and enjoyed by the public as a common highway for foot passengers, horses, carts, and carriages, going to and coming from the ferry; that the former lessees of the ferry from the Ordnance were bound by the conditions of their leases to keep such road in repair; that during the whole period of more than twenty years this road had been in no manner obstructed, but had continued to be open and free to the public, and was always actually used and enjoyed by them till the defendant Fralick obtained his lease, when he took upon him to shut it at such times as he pleased, thereby preventing carriages from going along the road to the ferry any further than that gate.

In our opinion, there was, as we must understand the admissions, a public highway leading to the ferry through the small tract leased to Fralick; and, indeed, whether the tract leased consisted of anything more than that road does not appear. The Ordnance Board were in their department agents of the Government; and we cannot, we think, hold otherwise, than that the Crown must be supposed to have had knowledge of the existence of the highway, and of its unrestrained use and enjoyment by the public. It is admitted further, that in the former leases which had been granted by the Ordnance of the ferry, it was made an express condition that this very road should be kept in repair by the lessees. That shews unequivocally an intention of the Crown through its agents to dedicate the road to the public—if, after so long an user with the knowledge of the Crown, such evidence were necessary.

Then, further, we have the defendant Fralick himself covenanting in his lease that he will not remove rocks, or make any excavations except where it may be necessary for the *improvement of the road*, which is a distinct recognition by him of the existence of a road; and surely it is altogether inconsistent with this stipulation by him that he should claim a right to exclude the public from the road. If he can do so for a day, or any part of a day, he can do so altogether; and if he can legally block up one part of it, he can close up the

whole. The case of *Harper v. Charlesworth* (6 D. & R. 582), shews that there may be a dedication by the Crown presumed, as well as by individual; and the facts upon which it was submitted to the jury in that case, whether there had or had not been a dedication, are by no means so strong in favor of such a presumption as the facts in this case.

The defendant Fralick may have imagined that his lease from the Ordinance (supposing it to have been properly executed, and admitting the right to make such a lease) gave him a right as lessee, not merely to receive the profits of the ferry, to which the road forms the access, but gave him so complete a control over the road that he might close it at his pleasure, and do what he liked with it. But that could not be the effect of such a lease upon any principle of the common law, and there is nothing in the Ordinance Vesting Act, 7 Vic. ch. 11, that could interfere with any public right of way that had been acquired by statute, grant of the Crown, or otherwise, over any of the property thereby vested in the Ordinance. On the contrary, the first and fourth sections seem intended to guard against any such effect being ascribed to the statute.

It was urged upon the argument that, according to the actual facts of the case, there is no truth in saying that the former road to the ferry was obstructed by the defendant, for that the gate or bar put up by him, was not across the line of road; but we can only take the facts to have been such as are stated in the case submitted to us, though if it were admitted that there has been an error in stating them, the error should be corrected.

We do not know how it comes to be admitted, as it is in the case before us, that Fralick is the lessee of the ordnance of the *Niagara Falls Ferry*; for the lease makes no mention of the ferry, and the statutes 8 Vic. ch. 50, and 9 Vic. ch. 9, make it impossible that any one should in 1846, or since, have acquired a right to ferry otherwise than by direct grant from the Crown. It is only the road leading to and from the ferry that the Ordinance have assumed to lease, and this makes the case more clear against the defendant in the indictment for nuisance, for while the Crown retains in its

hands the sole right of leasing public ferries, and this by the act of the legislature, it never could be intended that the Ordnance Department, or their lessees, should have authority to stop the road which for twenty years had formed the access to the ferry, for which rent is paid to the Crown, and which, for all we can tell from the statement of the case, may be the only approach which the public can have to it.

Judgment for the Crown in *Regina v. Fralick*.

Judgment for defendants in *Regina v. Davis et al.*

REID V. GORE DISTRICT MUTUAL FIRE INSURANCE COMPANY.

Insurance—Policy avoided by increased risk.

The plaintiff received from defendants a policy of insurance for £750, by which they insured on a stone building £400, and on furniture and other goods therein £200—all at the rate of 8 per cent.; on a frame building £100, and on goods and tools therein £50—all at the rate of 12 per cent. One of the conditions of the policy was, "that if after insurance effected the risk shall be increased by any means whatever within the control of the assured, or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void."

It was proved that after effecting this insurance the plaintiff put up a steam engine in the frame building, and, in order to make it as safe as possible, erected a small engine house of brick at the back of the building. Some witnesses swore that if care was taken the risk would not be increased, but many swore that it would; and it was proved that the plaintiff was told by the agent of the Company that if he put up the engine he would have to apply and pay an additional premium; that he made no such application; that he endeavoured to effect an insurance at other offices, but was refused, the risk being considered too hazardous, and that he had acknowledged that he knew the policy was void because he had made no arrangement with defendants in consequence of the additional risk.

The frame building was destroyed by fire which began in the upper part of it, and a portion of the goods in it were destroyed. The stone house was also much injured by the same fire, and the furniture in it partially destroyed.

Held, that as a matter of form it was necessary to submit it to the jury whether in fact the risk was increased, but that under the facts proved the policy was clearly avoided.

Action on a policy of assurance, dated 18th March, 1850, for £750—viz: £400 on a stone building covered with wood, on the south side of King street west, in the city of Hamilton, occupied by the plaintiff as cabinet ware-rooms, and on the furniture and other goods therein, £200—all at the rate of 8 per cent., making £48 premium; on a frame building on the east side of Bond street in Hamilton, occupied by the plaintiff as a workshop, £100; on goods,

tools, &c., therein, £50—all at the rate of 12 per cent., making £18 premium for insurance for three years.

Among the conditions of the policy set forth in the declaration was one, "that if after insurance effected the risk shall be increased by any means whatever within the control of the assured, or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void."

The plaintiff alleged that on the 27th of July, 1852, the stone house and furniture and goods therein, and the frame house and goods and tools therein contained, were burned and destroyed—setting forth his damage at £315; and he averred "that the risk was not increased by any means whatever within his control, nor were the said buildings, or any of them, occupied in any way so as the risk was more hazardous than at the date of the policy."

The defendants, besides other pleas, pleaded (fourth plea) that after the making the policy and before the fire, the risk was increased *by means within the control of the plaintiff*.

5th plea. That the buildings were occupied in such a way as that the risk was more hazardous than at the date of the policy.

6th plea. That on the 27th of January, 1852, without the knowledge or consent of the defendants, an alteration and addition were made by the plaintiff in and to the framed building mentioned in the policy, and was continued with the knowledge of the plaintiff up to the time of the loss, whereby the risk upon the said building and the goods and tools therein, and also upon the stone building and other goods and furniture therein, and upon all the assured buildings and premises, was increased and became more hazardous than at the time of making the policy; and that the plaintiff did not, immediately after the making of such alteration, &c., or at any other time, give defendants notice of the same, nor did the defendants at any time approve of or ratify such alteration,—whereby the policy became void, according to the conditions thereof.

7th plea. That after the policy and before the fire, viz.,

on, &c., the plaintiff, without the knowledge or consent of the defendants, erected in the said framed building, occupied by the plaintiff as a workshop, a steam engine worked by steam, and used by the plaintiff for planing and turning, and other purposes in his business of cabinet making, and kept such steam engine in the said building until the happening of the fire; and that through and by means of the erecting and continuing such steam engine in the said building, and using the same as aforesaid, the risk upon the said building and upon the goods and tools therein, and also upon the stone house insured, and the furniture and goods therein, and upon all the other insured premises, became increased and much more hazardous than at the time of effecting the insurance—averring that no notice of the erection of the said steam engine was given to the defendants, and they did not at any time approve of or ratify it,—whereby, it was alleged, the policy became void.

The plaintiff replied *de injuriâ* to the 6th and 7th pleas.

At the trial at Hamilton, before Burns, J., it was proved that the plaintiff did erect a steam engine in order to do work by machinery in the wooden workshop, which was insured, and that in order to make it as safe as practicable a small engine house was built of brick at the back of the wooden building.

The plaintiff's witnesses swore that they thought if care was taken in the management of the engine and furnace, &c., the risk would not be increased; but the defendants proved by several witnesses that the risk was much increased; that the plaintiff was told by the agent of the Company that if he put up the engine he would have to apply and pay an additional premium; that he made no such application; that he endeavoured to effect insurance at other offices, and that the risk was considered so hazardous that it was declined. Many witnesses called for the defence swore that the risk was made much more hazardous by the putting up and using the engine. It was proved also that the plaintiff acknowledged that he knew the policy was void by reason of his not having made the necessary arrangement with the Company, in consequence of the additional risk.

The frame building was destroyed by the fire which seemed to have begun in that building, in the upper part of it. A portion of the goods in it were destroyed, and the stone house was also considerably injured by the same fire, and the furniture in it partially destroyed.

The learned judge held that the plaintiff could not recover, considering it to be self-evident that the erection and use of the steam engine increased the risk; and it was agreed that if the court should be of the same opinion, a nonsuit or verdict for the defendant might be entered. Subject to this reservation the case went to the jury, and they gave a verdict for the plaintiff for the amount of damage, which had been estimated at £116 17s. 6d.

Cameron, Q. C., obtained a rule nisi to enter a verdict for the defendants, or a nonsuit pursuant to the leave reserved, or for a new trial on the law and evidence. He cited 6 W. IV. ch. 18, sec. 20; *Glen v. Lewis*, 21 L. T. Rep 115.

Read shewed cause, and cited *Barrett v. Jermy*, 3 Ex. 535; *Shaw v. Robberds*, 6 A. & E. 75.

ROBINSON, C. J., delivered the judgment of the court.

That the verdict was against evidence is certain. The only question is, whether it was not so clearly contrary to law, on the facts which were uncontradicted, that the court may properly, on the leave reserved, direct a nonsuit or a verdict for the defendants.

We take it to be very clear that under the facts proved the policy was rendered void, and that there could scarcely be a stronger or clearer case; for the plaintiff was fairly warned what the effect would be, and was conscious that he required other insurance in consequence of the alteration he was making. He applied for it in other quarters and could not obtain it, because the risk was judged to be too hazardous in consequence of the very change he was making after he obtained the policy which he is now seeking to enforce; and the very thing which according to the policy he ought to have done he omitted to do, although his attention was pointedly called to it; that is, the applying for the sanction of the defendants who had insured the

premises in their former state, and who would probably have agreed to continue the insurance on his submitting to pay a reasonable premium in addition.

As we see no object in going to another trial, we make the rule absolute for a nonsuit, which we assume it was intended we should do by the way in which the case went off at the trial, if we thought the plaintiff had clearly lost the benefit of his policy. No doubt it was for the jury to say whether the risk was increased or not, but where a case is so clear upon the facts as to leave no room for doubt, there is nothing that it can be important to take the opinion of the jury upon, though, as it was a question for the jury, it was necessary in point of form to submit it to them, if the understanding had not been come to to refer the case upon the evidence to the court.

It is impossible to contend for a moment that the conditions of the policy were not violated by building an addition close up against the frame building and putting into it a steam engine with boilers and furnace, and using it until the accident occurred. It seems more than probable that it was the fire from the furnace used for this engine which set fire to the frame building; but the question as to the policy being destroyed by it, would not turn upon that. It is sufficient that the plaintiff did what he engaged not to do, and thereby added to the hazard, as it is certain he did.

The frame building was immediately joining the engine house, and it took fire and was burnt, and although the other building which took fire, and with the furniture in it was partially destroyed, was much more remote from the engine house, yet it is plain enough that the risk to that was increased by anything that increased the risk to the frame house, for it did actually take fire from the frame house, thereby demonstrating that whatever endangered the one endangered also the other. We have looked at the cases of *Shaw v. Robberds et al.*, and of *Barrett v. Jermy*, cited by Mr. Read, and also at the very late case of *Glen v. Lewis*, cited by Mr. Cameron; but neither these nor any other case can contain any thing that would show the policy not to be avoided by what was done in this case,

for if that could be so held there would no longer be any use in such conditions. The facts of this case are too strong to be got over. It is upon the fourth, fifth, and sixth pleas that the defendants should have a verdict entered for them, if the plaintiff does not prefer to be nonsuited, for these pleas alone state the facts truly. The seventh plea was not proved at the trial, for no alteration was made in the frame building as there stated, and it may be questioned whether the fifth and sixth pleas were fully proved (a).

MICHAELMAS TERM, 1853.

Present:—THE HON. JOHN BEVERLEY ROBINSON, C. J.

“ WILLIAM HENRY DRAPER, J.

“ ROBERT EASTON BURNS, J.

PALK V. KENNEY.

Case for maliciously suing out attachment in Division Court—Evidence of malice—Notice of action under 13 & 14 Vic. ch. 53, sec. 107.

Case for maliciously suing out an attachment in the Division Court.

Held, that the defendant was not entitled to a month's notice of action; for the statute was intended to protect persons acting under it in the discharge of some duty, and not parties proceeding for their own benefit.

Held, also, that the jury might with propriety infer malice from the fact of the defendant having recovered a sum less than that attached for, unless he could satisfactorily account for his having sworn to the larger sum.

The plaintiff complained in case for maliciously suing out an attachment from the Division Court against his goods, under the statute 13 & 14 Vic. ch. 53. He complained, in the first count, that the defendant swore to a debt of £23 4s. as being due to him by the plaintiff, when no such debt as that was due—but only to a smaller amount; and, in the second count, he charged that the defendant, not having

(a) At the conclusion of the judgment Mr. *Read* stated that it was not agreed at the trial that the court should be allowed to draw conclusions from the facts, and he therefore objected to a nonsuit. The court then ordered the rule to be made absolute for a new trial without costs.

any reason to believe, and not believing that this plaintiff was then about to leave the county of Simcoe, with intent to defraud him, the defendant, of the debt due, taking away personal property liable to seizure under execution for debt, maliciously made oath that he had good reason to believe, and did believe that this plaintiff was then about to leave the county of Simcoe with intent and design to defraud him the now defendant of the said debt, taking away personal property liable to seizure under execution for debt.

The defendant pleaded not guilty "by statute."

At the trial at Barrie, before McLean, J., the evidence shewed that this defendant having proceeded by summons in the Division Court, in the suit in which he had taken out the attachment, recovered only £9 10s. instead of £23 4s., the sum for which he attached the plaintiff's goods; and there was good ground for believing, from the evidence, that the plaintiff Palk was put to some inconvenience, in consequence, which might probably have been avoided if the defendant had sworn to no larger a debt than he recovered.

The defendant did not upon the trial shew what ground he had for claiming more than £9 10s.; and on the part of the plaintiff it was proved that on the day when the defendant had the goods attached, the plaintiff was proceeding to sell them by auction, in order to pay his creditors, having before publicly advertised the sale, of which fact the now defendant was aware.

It appeared to the learned judge, that under such circumstances the defendant had no ground for swearing that he believed the present plaintiff was about to leave the county of Simcoe with intent to defraud him, taking with him his personal property, when he was proceeding so openly within the county to dispose of his goods, instead of removing them.

The defendant's counsel objected that under 13 & 14 Vic. ch. 53 sec. 107, he was entitled to a month's notice of action. This objection was overruled.

The jury found a verdict for the plaintiff, and £7 10s. damages.

Eccles obtained a rule nisi to set aside the verdict, and for

a new trial without costs, on the law and evidence and misdirection.

Read shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

Though the sums are neither of them large, the difference between them is considerable; and though the jury were properly told that that circumstance did not of itself necessarily furnish ground for imputing malice, yet that inference might be drawn from it by a jury with propriety, if the defendant did not satisfactorily account for his having sworn to the larger sum.

The case went fairly to the jury on both points, and whatever may have been the impression under which the defendant acted in suing out the attachment, this has certainly the appearance of being an abuse of the remedy given by the statute. It was for the jury to judge of the spirit in which the defendant acted, and we cannot say, looking at all the evidence, that they have taken a wrong view of the case. The defendant's conduct in refusing the security that was offered, and in persisting in suing out the writ when he was remonstrated with by other parties, who had heard of his intention, lays him open to the inferences drawn by the jury.

It was objected by the defendant's counsel on the trial, that notice of action was necessary to be shewn in this case, but the exception was overruled, and we have no doubt properly; for the protection is not given to the party who sets the proceeding in motion for his own benefit, but to officers and others who are concerned in carrying into execution for the benefit of suitors the authority given by the statute.

BURNS, J.—It does not appear to me necessary that the plaintiff should have given this defendant a month's notice before bringing the action. The 107th section, respecting these notices, declares that it is *for the protection of persons acting in the execution of the act*. The county court judge, clerks, bailiffs, and officers, in what they do for others, invoking the aid of the statutes creating the division courts and regulating the practice thereof, so long as they, in the dis-

charge of the several duties imposed upon them act *bond fide* under the provisions of the different statutes, are protected no doubt by the 107th section. The question is whether the provisions of the statute apply also to parties seeking to recover their debts by means of the remedy afforded by the legislature adopted in this case. I do not think this was ever intended; and if it be so in cases of parties commencing a suit by an attachment, the same reasoning must apply to suits commenced by summons. The line of distinction, as it appears to me, is this—"for anything done in pursuance of this act" has reference to the previous words, "*acting in the execution of this act*," and then the meaning is, discharging some *duty* imposed. Now there is no duty imposed upon any person to sue out an attachment under the provisions of the division court acts. There may be duties arising upon the matter during the progress of a suit so commenced, in which it is perhaps possible the section might be construed as a protection to a party to the suit, but such is not the case in this action. The 64th section of 13 & 14 Vic. ch. 53, gives the plaintiff a remedy to enforce the payment of a demand in certain cases by peculiar process. A plaintiff resorts to this remedy, not in *execution* of the act giving him the remedy, nor in *obedience* to it, but simply because the legislature have *enabled* him to enforce his common law rights in that mode. It is optional with him to take such course, and when he has chosen to take that remedy, any liability arising from the immediate step, not depending upon any duty imposed, must depend upon the common law liability arising upon it as soon as the act done is committed, and it is not postponed to arise at the expiration of any notice to be given. The objection raised by the defendant at the trial cannot therefore prevail (*a*).

DRAPER, J., concurred.

Rule discharged.

(*a*) See Thomas v. Stephenson, 17 Jur. 597.

HALL V. DENHOLM.

Statute of Frauds—Promise to pay the debt of another.

The plaintiff declared on a promise to pay two quarters' rent due on certain premises which had been leased by the plaintiff to one G., the consideration being that the plaintiff would forbear to distrain. It appeared that when the promise was made only one quarter's rent was due.

Held, that the case of *Williams v. Thomas* (10 B. & C. 664) was in point—that the promise, being void as to the first quarter's rent by the fourth section of the Statute of Frauds, was void altogether, and that the plaintiff must be nonsuited.

ASSUMPSIT.—The first count of the declaration was special, setting forth that one Grover, at the time of the defendant's promise, and for six months previous to the 1st of March, 1847, and from thence to the 1st of May, 1846, was tenant to the plaintiff of certain premises in Peterboro', by virtue of a demise by the plaintiff, commencing on the 1st of September, 1846, at the rent of £27 10s. a year, payable quarterly;—that on the 1st March, 1847, two quarters' rent, £13 15s., was due, and on the 23rd April, 1847, divers goods of Grover, of the value of £30 and more, were in and upon the premises, liable and subject to be taken for the two quarters' rent, and the plaintiff intended to have taken the goods as a distress—of all which the defendant had notice; and in consideration that the plaintiff at the defendant's request would not distrain the goods of Grover upon the premises, but would forbear and desist, the defendant promised the plaintiff to pay him the £13 15s. for the quarter's rent, and the plaintiff, confiding in that promise, did forbear.

There were other counts for interest upon and for the forbearance of moneys, and upon an account stated, and for use and occupation of plaintiff's premises by the defendant and his servants.

The defendant pleaded *non-assumpsit*.

At the trial at Peterborough, before *Burns, J.*, the facts appeared to be these:—In 1847 Grover and his partner Foley were indebted, and made an assignment of their stock in trade, including all their private property, to their creditors. At that time Grover was a tenant of the plaintiff of a dwelling house at £27 10s. a year rent, payable quarterly. The two quarters' rent became due on the 1st of March, 1847, and Grover occupied till the 1st of May after. The

assignment was made after the first quarter's rent became due, and the defendant then first promised to pay the rent of the plaintiff. The defendant was acting as an agent for the creditors in winding up the affairs of the bankrupt estate, and he retained Grover in their employ to assist him, and Grover stated that he would not have continued to rent the plaintiff's premises or live in the house after the assignment, if the defendant had not promised to pay the rent. In February, 1847, before the second quarter's rent became due, the creditors sold off the stock in trade, and also the furniture in the rented house, and the sale was by the sheriff upon execution. It was arranged, the defendant being party to it, that the furniture should be purchased by one Keeler, and that Grover should be allowed the use of it, and should remain in the house, and that the defendant should pay the rent; and this arrangement was made before the property was sold. No writing was signed by the defendant.

It was objected on the part of the defendant—

1st. That the goods were in the custody of the law in execution, and the plaintiff could not distrain, he could only give the sheriff notice of his claim for rent and therefore the declaration was not sustained.

2dly. That there was only one quarter's rent due when the promise was made, and that was past due, and the second quarter not then due, and it would require a memorandum in writing to charge the defendant, the contract being indivisible.

3dly. That the goods being bought by Keeler, the defendant had no interest in them, and therefore there was no consideration for the defendant making the promise to pay any part of the rent.

The learned judge overruled for the present the objections, and directed a verdict for the plaintiff for £13 15s., the two quarters' rent, reserving leave to the defendant to move to enter a nonsuit.

Leith obtained a rule nisi to enter a nonsuit according to the leave reserved, or for a new trial without costs, the verdict being contrary to law and evidence, and for misdirection. He cited *Thomas v. Williams*, 10 B. & C. 664.

Weller shewed cause.

BURNS, J., delivered the judgment of the court.

This case is undistinguishable from that of *Thomas v. Williams* (10 B. & C. 664). The action is brought to recover two quarters' rent upon an agreement made after the one quarter was due, and while the other quarter was accruing due, to pay both, and both being clearly for the debt of a third person. If the evidence had shewn that the plaintiff was about to distrain for the quarter which was due, still the agreement was not to pay that rent in consideration of forbearance to distrain for that quarter. If it had been so, then it would have been perhaps within the case of *Williams v. Leper* (3 Burr. 1886), but in this case the plaintiff declares upon an entire contract to pay both quarters' rent in consideration of forbearance, and the evidence establishes it to be so. The contract is entire; and begin an express promise to that extent, there cannot be another implied as to part.

The rule should therefore be made absolute to enter a nonsuit.

Rule absolute.

RIACH ET AL. V. HALL, AND PATTERSON V. HALL.

Notice of trial on writs of trial—order for immediate execution—notice of taxation—return to writ of trial—8 Vic. ch. 13, 16 Vic. ch. 175.

Notice of trial of a Queen's Bench cause in a County Court cannot be given by anticipation, before the writ of trial has been obtained.

Under 16 Vic. ch. 175, a County Court judge can order immediate execution in cases sent down to him by writ of trial, as well as in other cases; the 53rd clause of 8 Vic. ch. 13, being in effect overruled.

The omission to give notice of taxation is not in all cases a sufficient reason for setting aside judgment.

The filing of the writ of trial with the verdict endorsed on it, signed by the judge of the County Court, is a sufficient compliance with the statute.

The want of a *postea* according to the form given in the rule of court of H. T. 10 Vic. was held no objection, and if indispensable the court would have allowed such *postea* to be afterwards filed.

RAICH ET AL V. HALL.

Eccles obtained a rule in this term, calling on the plaintiffs to shew cause why the notice of trial served in this cause, the order for writ of trial, the writ of trial and proceedings thereon, the certificate for immediate execution, the final judgment and execution, and all subsequent proceedings should not be set aside, on the following grounds:—That the

notice of trial was served before any order was made for a writ of trial :—

That the order was made too late to admit of proper notice of trial being given for the next sittings of the County Court :—

That the trial was had out of its turn, and without due notice of trial :—

That the certificate for immediate execution was granted without any authority in the judge :—

That the judgment was entered without any notice of taxation, without any proper or formal return of the judge upon the writ of trial, and before the writ of trial had been filed in the crown office, or had remained there six days.

It was shewn that a declaration was filed and served on the 31st of October last, and a plea filed and served on the 8th of November, on which day notice of trial was served on the defendant's attorney, for the next sittings of the County Court for the united Counties of York, Ontario, and Peel, to be holden on the 15th of November :—

That on the 9th of November a summons was served on the defendant's attorney, to shew cause why the issue joined in this cause should not be tried in the County Court, upon a writ of trial, and on the 10th of November an order of a judge made for a writ of trial, in the common form, not specifying at what sittings of the County Court the case was to be tried :

That on the 15th of November the writ of trial was entered for trial in the County Court :—

That on the same day, and before other causes standing higher on the list were disposed of, this case was tried in the absence of the defendant and his attorney and counsel :—

That on the same day the judge of the County Court indorsed on the writ of trial a certificate, that in his opinion execution ought to issue for the amount recovered *forthwith*; and that, on the same day also, without notice of taxation, final judgment was entered and costs taxed and execution issued, upon which the defendant's goods were seized by the sheriff.

On the 19th of November notice was served on the plaintiff's attorney, that an application would be made to this court to set aside the proceedings for the above reasons.

PATTERSON V. HALL.

In this case a rule was obtained by *Mr. Eccles*, to shew cause why the judgment *fi fa.* and subsequent proceedings, and certificate for immediate execution indorsed on the writ of trial by the judge of the County Court should not be set aside, because the judgment was entered and costs taxed without notice of taxation, without any formal or proper return by the County Court judge upon the writ of trial, or without the writ being returned or filed in the crown office ; or because the judgment was signed before six days from the time of filing the return had expired ; and because the judge had no authority to grant a certificate for immediate execution.

This application was supported by an affidavit precisely like that in the case of *Riach* and others, except that no exception was taken in this case as regards notice of trial, and there was therefore no statement of any thing irregular in that respect.

As to trial, judgment, want of taxation, and of filing of writ after trial, certificate for immediate execution, and notice of this application, the affidavits were alike. Both cases were argued at the same time.

Hagarty, Q. C., shewed cause.

The clauses of the statutes bearing on the question are referred to in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

In the case of *Riach et al. v. Hall*, the defendant is entitled, we think, to have his rule made absolute to the full extent of setting aside the notice of trial, and all that was done after it. We think it was not a regular proceeding for the plaintiffs to give notice of trial in the County Court before that court was in possession of the cause, and indeed before the writ of trial had even been applied for.

The writ was ordered upon the assumption, of course, that it would be acted upon, as the practice requires. It gave no sanction to any attempt that had been or might be made to get the case irregularly to trial. The statute 8 Vic. ch. 13, which authorizes the trial in such cases by the County Court,

provides for the probable contingency of the writ being sometimes applied for when it may be too late to make use of it at the next ensuing sittings of the court, for it directs that the command may be to try at the first or second sittings after the issuing of the writ. We see nothing to warrant the giving the notice by anticipation in this case, any more than the giving notice of trial at the assizes for a county into which a plaintiff proposes to apply to remove the venue being allowed to amend his declaration in that respect; but before he has obtained the order or even applied for it; and if a plaintiff should be upheld in such a proceeding as the present, where the effect was to give but six days' notice after the County Court came into possession of the cause, we would not, upon any legal principle, refuse to sanction the same method of proceeding, though the writ of trial should be obtained but a day before the sitting of the County Court.

It is unnecessary for the purpose of disposing of the rule in this case of *Riach et al. v. Hall*, to go into any of the other exceptions, as the whole must be set aside with costs—the notice of trial being, as we think, a mere nullity, and the defect of any legal notice not being such as could be held waived by want of notice of exception before the trial, or by anything that was done or omitted by the defendant.

The other case of *Patterson v. Hall*, however, turns wholly upon the other exceptions to the proceedings in the later stages, the notice of trial being regularly given in that case.

The main question intended to be raised in this latter case is, whether immediate execution could be ordered by the judge of the County Court, upon a verdict which he has taken upon a writ of trial from this Court. Upon considering the provisions in our statutes 8 Vic. ch. 13, secs. 51, 53, 54, 55, and 16 Vic. ch. 175, secs. 27, 28, 29, we are of opinion that the judge of the County Court has the power given to him in such cases of ordering immediate execution.

There can be no doubt that immediate execution could not be obtained afterwards by any order that could be made in the superior court. Such order must be made by the judge who tried the cause, or it cannot be made at all. It need not be said that 8 Vic. c. 13, under which the writ of trial issues, gives no such authority, for the Legislature had

not at that time allowed such a discretion to be exercised by any judge of any court. They had not the subject then under consideration; and if in consequence no authority is to be found in that act for making an order for immediate execution, it is as true on the other hand, that no inference is to be drawn from the legislature omitting in that statute to provide anything upon the subject. But we think that it is the fair effect of the late statute 16 Vic. ch. 175, secs. 27, 28 & 29, to allow the judge of the County Court to order immediate execution in any case tried before him under a writ of trial, when under the circumstances appearing before him he shall think it just and expedient.

No argument can be drawn in favor of a different construction from the fact that in cases tried in England before the under-sheriff he can grant no certificate; because in the cases from the courts at Westminster, which are tried before the under-sheriff, the plaintiff is not tied up till the next term, but may obtain his judgment and execution without delay, unless an order is made to stay his proceeding.

It is true that our County Court Act, 8 Vic. ch. 13, under which these writs of trial issue, does contain provisions inconsistent with an order for immediate execution; for, if nothing had been since enacted by the legislature affecting this matter, the 53rd clause would still have required that a delay of six days should take place before judgment could be entered. But the 16 Vic. ch. 175, we think, now overrules that provision, and gives to the judge of the County Court the discretion to make an order for immediate execution in such cases as he has authority to try, whether instituted in his own court or in this court. That seems to be the fair construction of the 27th clause. Great inconvenience would arise, and possibly great hardship and injustice, in holding otherwise, and we see no reason to apprehend any difficulty from such a course, which might not equally arise if the case had not been sent down to the County Court. The statute is a remedial one, meant to protect against frauds, and to secure suitors in the fruit of their verdicts. It should therefore receive a liberal construction, and it should be assumed that the judge in the County Court, and the judges of the court from which the cause is sent, who will have power to inter-

pose by rule in vacation, will exercise a sound discretion in discharging their respective duties upon such applications as may be made to them ; and if they do, there seems no room for apprehending injustice, or any inconvenient clashing of authority.

The statute 16 Vic. ch. 175, must be taken to relieve plaintiffs now from the necessity of waiting the six days prescribed by the 53rd clause of the former act, when they can convince the County Court Judge that they have grounds for pressing for immediate execution.

To hold otherwise, would place the plaintiffs in such cases in a very peculiar position, for plaintiffs in other suits against the same debtor might be obtaining immediate execution, upon verdicts obtained either in the higher court or in the lower, while these plaintiffs, proceeding under writs of trial, would be helpless, and must wait till the term, though in the mean time all the effects of their debtor would be swept away by parties who had proceeded wholly in the one court or in the other. The legislature surely never could have meant that, and we think that in the statute 16 Vic. ch. 175, they have given sufficient indication of a contrary intention.

Upon this ground therefore, we do not think we can interpose ; and we do not find sufficient ground otherwise laid for making any order upon the rule in this case.

It is not admitted to be a sufficient reason in all cases for setting aside a judgment, that notice of taxation of costs was not given ; and, as to the judgment being signed before the writ of trial had been properly returned, we understand that to mean, not that the writ of trial with the verdict indorsed upon it had not been returned in fact and filed in this court, but that there had not been a formal postea made out and signed by the judge of the county court. The filing the writ with the verdict indorsed upon it, signed by the judge, would be a sufficient compliance with the statute. The rule of court of Hilary Term, 10 Vic. gives a form of postea to be made out by the judge ; but where there is a record of a verdict or conviction in a civil or criminal case, it is generally allowed to be put in a more extended form at any later time, when that may be necessary in order to support what has been done under it ; and the rule referred to expressly pro-

vides that in case of non-compliance with the forms, the court or a judge may give leave to amend. We should, therefore, if the objection were insisted on and we thought the postea indispensable, give the plaintiff leave to file it *nuncpro tunc*.

In the case of Riach and others v. Hall, we make absolute the rule for setting aside the notice of trial and all subsequent proceedings, with costs; and in Patterson's case we discharge the rule, with costs.

Rules accordingly.

MCPHERSON V. FORRESTER.

An action is not maintainable in this court on a judgment obtained in a division court under 13 & 14 Vic. ch. 53.

The question raised by the demurrer in this case is stated in the judgment.

Irving, for the demurrer—*Lemon*, contra. In addition to the cases referred to in the judgment, *Austin v. Mills*, 21 L. T. Rep. 106, was cited for the demurrer; and *Gilbert on debt*, 392; *Messin v. Lord Massareene*, 4 T. R. 493; *O'Callaghan v. Marchioness Thomond*, 3 Taunt. 82, contra.

ROBINSON, C. J., delivered the judgment of the court.

This demurrer brings up an important general question, whether an action can be sustained in this court upon a judgment rendered in a Division Court.

We think we must hold that it cannot, on account of the special provisions made in the statute as to the manner of enforcing division court judgments, and from the manner in which these provisions would be interfered with, if the plaintiff who has obtained his judgment could go at once into a higher court and sue upon it.

It is very true that our statute 13 & 14 Vic. ch. 53, does contain a clause (52nd) which Mr. Lemon relied upon, and not without reason, for shewing that the legislature did contemplate the suing in higher courts upon judgments rendered in the division courts; for in that clause they enact, "That in any suit brought in any court for the recovery of any sum awarded by any judgment in a division court held under this act, no costs shall be recoverable without the order of the judge;" but that is a mere negative provision. It will have a meaning and an operation given to it, if we suppose it

meant to apply to in which actions might be brought in one division court upon judgments recovered in another ; and we do not think we can allow our judgment upon the question to be influenced by the existence of that merely negative clause, imported, as it evidently was, into this statute from a former act, without duly reflecting upon the very great difference between such former act and the system about to be established by this statute.

The judgment given after full consideration by the court of Queen's Bench in England, upon a similar question under circumstances substantially the same, in the case referred to by Mr. Irving, of *Berkeley v. Elderkin* (22 L. J. Q. B. 282), fortified as it is by the opinions expressed in the case of *Patrick v. Shedden*, depending in a court of equity, which affected the same principle, and which occupies the next page in the volume referred to, brings us to the conclusion that we must give judgment for the defendant on this demurrer.

The reasons given by the Court of Queen's Bench, are very convincing, and they apply with full force to the same question as it is presented in this country.

The judgment is not a final judgment, in the sense in which it must be final to make it the ground of an action in this court, though final in this sense, that there is no appeal from the decision. The judgment, however, must continue to remain within the control of the division court, not interfered with by any remedy for enforcing it elsewhere, or else the provisions made by the legislature regarding such judgments would be defeated.

Judgment for defendant on demurrer.

STARK V. FORD.

16 Car. I. ch. 10--*Penalty—Recorder's Courts.*

The 16 Car. I. ch. 10, was intended only to apply to the Court of Star Chamber and other courts therein mentioned, and not to such tribunals as the Recorder's Court for the city of Hamilton ; therefore an action against the mayor, acting as president of such court, charging that he falsely and knowingly caused a verdict of guilty to be recorded against the defendant on his trial for larceny, and claiming to recover therefor the penalty of £500 sterling, imposed by the sixth clause of the statutes was held not sustainable.

And, at all events, the record being unreversed, would have protected the defendant,

In this case, *Read* shewed cause against a rule nisi to set aside the nonsuit.

Martin, contra, cited *Miller v. Salmons*, 7 Ex. 475; *Douglas v. The Queen*, 13 Q. B. 79, 94; 2 Sm. Lea. Ca. 439; *McIntosh v. Jarvis*, 8 U. C. R. 535; *Doe dem. Henderson v. Seymour*, 9 U. C. R. 61; *Paley on Convictions*, 59; *The Queen v. Bolton*, 1 Q. B. 66; *Rex v. Constable*, 7 D. & R. 663; *The Queen v. Simpson*, 10 Mod. 382; *Rex v. Sainsbury*, 4 T. R. 451; *Pickett v. Greatrex*, 10 Jur. 566; *Houlden v. Smith*, 14 Jur. 598; *Ferguson v. Earl of Kinnoul*, 9 Cl. & Fin. 296, 320.

The facts sufficiently appear in the judgment of the court, delivered by.

ROBINSON, C. J.—This is an attempt, and not a very hopeful one, on the part of the plaintiff, to apply to the Recorder's Court of the city of Hamilton, in this province, the provisions of the statute 16 Car. I., ch. 10, for abolishing the Court of Star Chamber. The Recorder's Court of Hamilton is a court of record, having the same criminal jurisdiction within the city given to it by statute that the courts of General Quarter Sessions have in the several counties of Upper Canada; and there being no recorder yet appointed, the mayor is authorized and required by the statute to preside in the court. The defendant is mayor of Hamilton; and the allegation upon the record in this action is in substance, that this plaintiff, being indicted before him and his associates for larceny, was tried upon that indictment, and that the jury not having agreed to find him guilty, the defendant falsely and knowingly recorded against him a verdict of guilty, and sentenced him thereupon to be imprisoned as if he had been duly convicted.

Upon this allegation the plaintiff claims from the defendant in this action of debt the penalty of £500 sterling, which by the 6th clause of the 16th Car. I., ch. 10, is imposed upon any Lord Chancellor, or Lord Keeper of the Great Seal of England, Lord Treasurer, Keeper of the Privy Seal, President of the Council, Bishop, Temporal Lord, Privy Councillor, or judge or justice whatsoever, who shall do anything contrary to the purport, true intent, and meaning of that law.

What that act prohibits is the assuming to act any longer in the court called the Star Chamber, by doing any judicial or ministerial act therein. The oppressive use of the unconstitutional powers exercised by that court through a succession of ages had become intolerable, and the object of the statute was to abolish wholly and forever that tribunal, and certain other courts created for purposes of state in Wales and in the Duchy of Lancaster, and County Palatine of Chester, which had been in the habit of exercising similar powers. These are all in express terms dissolved; and it is enacted that from thenceforth no court, council, or place of judicature shall be erected or appointed within the realm of England or the dominion of Wales, which shall have, use, or exercise the same or the like jurisdiction as had been used or exercised in the said court of Star Chamber.

The whole provisions of the act shew that the intention of it was to put an end to these unconstitutional tribunals in England; and to make that more plain, if possible, the ninth clause declares that, "this act and the several clauses therein contained, shall be taken and expounded to extend only to the court of Star Chamber, and to the said courts holden before the president and council in the marches of Wales, and before the president and council in the northern parts, and also to the court commonly called the court of the Duchy of Lancaster, holden before the chancellor and council of that court, and also to the Court of Exchequer of the County Palatine of Chester, held before the chamberlain and council of that court, and to all courts of like jurisdiction to be hereafter erected, ordained, constituted, or appointed as aforesaid, and to the warrants and directions of the council board, and to the commitments, restraints, and imprisonments of any person or persons made, commanded or awarded by the King's Majesty, his heirs or successors, in their own person, or by the Lords and others of the Privy Council, and every one of them." This makes the matter so perfectly plain that it is no wonder it has never been attempted in England in the two hundred years that have elapsed since this statute was passed to apply its provisions to any of the ordinary courts of record of the kingdom constitutionally

established and proceeding according to the common law of the land, or to any of the judges of such courts. But it is rather wonderful that any one could seriously imagine that the first experiment of the kind could be successfully made, not in England itself, but in a colony, by prosecuting a judge of an ordinary court of record for an alleged malversation of his office upon a criminal trial conducted according to the course of the common law. That no such use can be made of the statute, is so plain that it would hardly have been a wider departure from its provisions, if we had been urged to impose the penalty upon the gentleman who occupied the time of the court in endeavoring to establish the contrary.

It was argued that, as the principal provisions of the great charter are recited in the act, they are so far made a part of it, that any court or justice plainly violating any of these provisions comes within the sixth clause, and incurs the penalty imposed in it. The object of reciting *Magna Charta* was to make it palpable how inconsistent with all its assurances were the proceedings of the Star Chamber; but the sixth clause has clearly no reference to it. There is scarcely an outrage upon liberty or the rights of property which would not be repugnant to the letter or spirit of *Magna Charta*, and if the argument of the plaintiff's counsel were sound, there would be few abuses which would not draw after them a penalty of £500.

The learned judge before whom this case came at the assizes, was so clear that nothing could be made of it, that he nonsuited the plaintiff upon his opening, and we therefore do not know upon what foundation the charge was made against the defendant which the declaration contains; but, taking the charge for the moment as one capable of being sustained in evidence, it is a charge made against a judge of a court of record for an act done by him in open court in the discharge of his judicial duties; and while the record which is in question is unreversed, it would be wholly opposed to the principles of English law, if upon the common law, or by any strained construction of an act of Parliament, an action of this nature should be sustained. I refer to the cases of *Groenvelt v. Burwell* (2 *Ld. Raym.* 213, 252, 454; *S. C.* 1

Salk. 396), *Hammond v. Howell* (1 Mod. 219; S. C. 2 Mod. 184) cases *Floyd v. Barker* (12 Co. 23), *Basten v. Carew* (3 B. & C. 649).

I need hardly refer to the statute 8 Ric. II. ch. 4, which by express provision subjects to punishment any judge or clerk who shall alter a record or change a verdict; for the plaintiff's case, as he has stated it, does not come within it. We think the nonsuit was proper.

Rule discharged.

DOE DEM. RICHARD HAY V. HUNT.

Alienage—Jay's treaty—4 Geo. IV., ch. 21.

The patentee of the lands in question died in 1813, leaving two brothers—

John, the father of the lessor of the plaintiff, and Richard, through whom the defendant claimed. John was born at Detroit in 1769. After a visit of some years to Montreal he returned to Detroit, and lived there till 1792, about which time he went into the employment of some merchants in Montreal who were trading in the West. After this engagement was put an end to he remained at Michillimackinac until 1795, when he removed to St. Louis in the United States, where he married and resided until his death in 1841, the plaintiff being born in that country. While there he held various public offices, which it seemed could by law be held only by American citizens, though the practice was otherwise. It was objected that under these circumstances he was an alien; or that at all events the plaintiff, his son, was so, and therefore incapable of inheriting: but

Held, that John Hay, being a natural born subject, could not lose his rights by residing in a foreign country, or by holding office there:—that he was not affected by the second clause of the treaty of 1794 (commonly called Jay's treaty), for that relates only to those persons residing within the jurisdiction of the posts referred to in the treaty at the time of their evacuation in 1796. That the plaintiff, as a son of a natural born subject, was within the 4 Geo. II., ch. 21, which applies as well to Roman Catholics as Protestants, and that he was therefore entitled to recover.

EJECTMENT for the south half of Lot 7, in the 6th concession of Woodhouse.

Demise laid the 1st of October, 1850, to hold for seven years, laying the ouster on the same day.

Plea—not guilty.

On the 20th of November, 1798, the Crown granted this land, with other lands (in all 1500 acres), by letters patent, to Ensign Henry Hay, in fee. On the 27th of September, 1847, a deed was made by Henry Desrivieres and Mary Angelica his wife, formerly Mary Angelica Hay, and by Austin Cuvillier and his wife Louisa Sarah, formerly Hay, whereby—after reciting this patent to Henry Hay; that he had died without issue and intestate; and that Mary Angelica Desrivieres, formerly Hay, and Louisa Sarah Cuvillier, formerly Hay, were the only surviving children of Richard

Hay, late of the City of Montreal, now deceased, who was brother of the said Henry Hay, and that they were, as such children of Richard Hay, entitled to inherit the real estate left undisposed of by the said Henry Hay—they bargained and sold to one Park, and to this defendant Hunt, in fee, for a consideration of £150, all the lands granted by the crown to Henry Hay, describing them by lots as in the patent. The defendant held under this deed.

The plaintiff claimed to be the legal heir of Henry Hay, and as such entitled to this land, being the son and heir of John Hay, an older brother than Richard, of the patentee Henry Hay, and therefore entitled to inherit in preference to the children of Richard Hay.

The defendant contended that John Hay was not a British subject at the time of the death of Henry Hay, but an alien, incapable of inheriting this land in Upper Canada, and of transmitting the same by descent to his children.

At the trial at Simcoe, before *Burns, J.*, a verdict was taken by consent for the plaintiff, subject to the opinion of the court on the evidence adduced, and it was agreed that the court should be at liberty to draw any conclusions therefrom which a jury might have done.

Vankoughnet, Q. C., for the plaintiff.

D. B. Read for defendant.

The statutes and authorities referred to are sufficiently noticed in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The event of this case will determine the right to the 1500 acres, which it is said have now become of great value. The patentee, Henry Hay, died in 1813, or about that time, and for all that appears the claim of the children of Richard, his younger brother, to be preferred to John the elder brother of Henry, who lived till 1841, and to his children since his death, seems to have been thought of but lately, and then not to have been very confidently entertained; for it was not till 1847, that they took upon themselves to make a conveyance of the lands to two persons by the name of Hunt and Park, for a consideration little more than nominal, and then they recite that what they meant to dispose of was only such interest as

they had, and they express in these deeds that they convey without warranty. It has much the appearance of the fact being, as it was stated to be in the argument of the case, that the daughters of Richard Hay and their husbands yielded to the solicitations of Park and Hunt, persons living in the neighbourhood of these lands, who had been prying into the title, and for a comparatively trifling consideration have agreed to put it in their power to make an attempt to displace the heir of the elder brother—an attempt which in the interval of thirty-four years had not been made, either by Richard Hay or by his daughters.

If the claim of the plaintiff as heir of John Hay shall be found to be fairly sustained in law, notwithstanding his foreign birth and continued foreign residence, there would therefore be no great hardship in that result of this case.

On the other hand, neither John Hay nor his heir seems to have given clear evidence till very lately of an intention to set up a claim to these lands of Henry, whether because there was any consciousness or not on their part that they were in law aliens, and from the impression that they had not the legal capacity to hold land in a British province, does not appear. There is indeed proof in the correspondence produced, that John Hay, in 1819, who was then living in the State of Illinois, did regard himself as having the beneficial interest in these lands of his late brother Henry, although it may have seemed to him doubtful whether the whole or the greater part of them might not be required for paying Henry's debts.

And there is a consideration not applying in any particular manner to this case, but which it seems proper to keep in view in disposing of any question of this nature—where the person nearest in succession is sought to be postponed on account of his alleged foreign character—namely, that by the late statute 12 Vic. ch. 197, sec. 12, the legislature has put this matter on this new and remarkable footing—that from and after the passing of that act, “every alien shall have the same capacity to take, hold, possess, enjoy, claim, recover, convey, devise, impart and transmit real estate in all parts of this province, as natural born or naturalized subjects

of her Majesty in the same parts thereof respectively." That enactment can have no effect in the present case, because it is qualified by a proviso in the same clause, that nothing therein contained "shall alter, impair, or affect in any manner or way whatsoever, any right or title legally vested in or acquired by any person or persons whomsoever, previous to or at the time of the passing of this act."

If by reason of an inability in John Hay to take or transmit, or in his son, the plaintiff, to inherit real estate in a British province on the ground of alienage, the lands now in question had, on the death of Henry become vested in his brother Richard, whose heirs we see did, in 1847, convey their estate to Park and Hunt, then this entire change in our law cannot deprive such heirs or their assigns of their already vested rights.

But this effect we think the statute to which we have referred may and ought to have—that since the legislature has been content, as regards all future devolutions and transfers of real property in Canada, to abolish wholly the distinction between aliens and subjects, and to allow aliens to acquire an interest in the soil as freely as the others, without limitation or formality, or precaution of any kind; and since this change in our laws and policy has been deliberately sanctioned by the Imperial Government, it ought not to be, by any refined, or rigid, or doubtful construction, that we should give effect to a principle of exclusion in regard to any past descent of property, which principle has been now wholly rejected and laid aside, as applicable to any future descent. The benefit of any real doubt should rather be given in favor of the person next in succession, and he should not be held to have been incapable of succeeding when the disability is not clearly made out.

The title to these lands was before us in this court in Michaelmas Term, 14 Vic., in actions brought on the several demises of Park and Hunt, and of the daughters of Richard Hay and their husbands, against persons who, without claiming title, had been long occupying some of the lots included in the patent to Ensign Henry Hay; but the facts in regard to John Hay and his family were so imperfectly elicited, that

the question of preference as between any child or descendant of John Hay and the daughters and co-heiresses of Richard Hay, his younger brother, was not presented to the court in such a manner as enabled them to decide upon it; or it was not shewn that there was any child or descendant of John Hay in existence; so that for all that could be said to be proved with any degree of certainty, the children of Richard Hay might be the heirs of John as well as of Henry, independent of any question of alienage.

The grounds upon which the cases to which I allude were disposed of appear in 7 U. C. R. 172, 189.

On the trial of this case the facts have been fully brought out, perhaps as much so as the nature of the case admits of. It may be doubted whether any further light can be thrown upon the matter. The evidence obtained upon the several commissions executed at Detroit and at St. Louis in the United States, and in Lower Canada, seems to have established without any reasonable ground of doubt, and upon the testimony of witnesses free from suspicion and of respectable position and character, all that is material to be known for determining the capacity of John Hay and of his son Richard to inherit this property in succession. The witnesses, most of them persons of a very advanced age speaking of occurrences which happened nearly sixty years ago, and which did not immediately concern themselves, have in several instances, as might be expected, not been able to fix dates with precision, and they do not agree exactly with each other as to time, were they speak merely from recollection. But the discrepancies do not seem to be such as can have any effect on the decision of the points involved. It appears to us also that no embarrassment is created by any doubt that may be entertained as to the propriety of receiving in evidence the manuscript account left by John Hay of the history of his father, Governor Hay, and of his own personal history, or the extracts from the family Bible, or the correspondence that was produced, dated in 1785 and subsequently, of the genuineness of which we see no reason whatever to doubt, for this written evidence only confirms such statements of the living witnesses as are in no respect

contradicted or shaken, and if admitted to their fullest extent, the effect of them would be to fix with precision some dates of births and other events, which by the other testimony is ascertained with as much particularity, as is necessary to the decision of the questions raised. We do not see that there is a variance between these writings and the other evidence upon which anything could turn.

We now, as it appears to us, have the following facts established :—

Ensign Henry Hay—to whom the crown granted by letters patent under the great seal of Upper Canada, in November, 1798, the 1500 acres of land in the township of Woodhouse, of which the 100 acres in question in this action form a part—was himself a commissioned officer, either in the 8th regiment of the line, which was then serving in Canada, or in the corps of Royal Canadian Volunteers, which was raised in Canada some time between the years 1790 & 1800. He was born on the 4th of September, 1765, at Detroit, which then belonged to Great Britain, being a military station and a trading post in that part of America which was conquered from France and ceded to the British crown by the treaty of peace concluded in 1763. He continued to live in his father's family in Detroit till in or about the year 1796, when he obtained his commission in the British army, and left Detroit before it was handed over to the American Government, in pursuance of what is called Jay's treaty, which took place, as the treaty provided it should, on or before the 1st of June 1796. He appears never to have resided out of the British dominions, and he died in Lower Canada in or about the year 1813, intestate, without issue, never having been married.

Both parties in this suit claim under him ; and his capacity to hold the land granted to him, till his death, and to transmit it by descent to his heirs, is not in question.

He was the son of John Hay, who is spoken of by all the witnesses who refer to him as Governor Hay. This John Hay, it appears, was born between the years 1730 and 1740 (one account says in 1732, another in 1738), in the then British colony of Pennsylvania, to which his parents had emigrated from Scotland ; according to either account he was old enough to bear arms in the French war, which was termi-

nated by the peace of 1763 ; and it appears that he held a commission in a corps called the Royal Americans, in which he served in the year 1756, and afterwards at Fort Niagara and at Detroit. He seems to have retired from active service in 1763, when his regiment was probably disbanded, and he remained in Detroit, where he received the appointments of town major and Indian agent, Detroit being then and until it was surrendered in 1796, a British military station and trading post. In 1778, during the American rebellion, he accompanied Governor Henry Hamilton of Detroit, who is well known in the early history of Canada, in an expedition made into the country upon the Watash, forming now the State of Indiana, where he was taken prisoner with Governor Hamilton, at Vincennes, by an American force under General Clark, and was sent prisoner to Virginia. He was liberated in 1781, upon exchange of prisoners, and went to England, where he received soon after the appointment of Governor or Superintendent of the post of Detroit, and came out in 1782 and joined his family, which had always continued in Detroit, and he resided there as Governor till August, 1785, when he died. Born a British subject, and living and dying in the service of the British crown, he was clearly a person through whom descent can be legally traced, as indeed both parties in this case have assumed.

As regards him and his civil rights, it can make no difference that he was serving the crown in a foreign country, Detroit being clearly within the American lines, as established by the treaty of 1783, though for the convenience of both governments the possession of Fort Detroit and other remote military stations was, by a tacit understanding, not actually changed for many years afterwards.

We come now to the facts that occasion the contest about the succession to this property.

This Governor John Hay, besides several daughters, had three sons—Henry, the eldest, to whom the Crown in 1798 granted the land now in question, John, and Richard ; and Henry, dying without issue and intestate, left John and Richard both surviving him, and the estate must of course have vested in John as the elder brother, unless for some peculiarity in the case disturbing the order of succession.

The defendant insists that John, though born a British subject, had, by his own conduct, taken in connection with subsequent events, become an alien before the death of his brother Henry, in 1813, and could not therefore take the land by descent; and he insists further that at any rate Richard, the plaintiff, who claims as the eldest son of John Hay, was an alien, being born in the United States of America after their independence, and not being naturalized by or under any law of Great Britain or of Canada, was incapable of taking this land by descent, even if his father John died seised of it.

The facts, as they regard John Hay and his son Richard the plaintiff, seem to be these :

John Hay, son of Governor Hay, and next brother of Henry, was born at Detroit in May, 1769. In 1779, during his father's captivity, as it appears, he was sent by his family to Montreal, in Lower Canada, to be educated, and was at School in Lower Canada when his father died in Detroit in August, 1785. This event seems to have occasioned his return to his family at Detroit, which was still in possession of the British Government; whether he ever returned to Lower Canada is left doubtful upon the evidence; from some parts of the testimony I should conclude that he did, from others that he did not; but Detroit seems to have been his home from 1785 to 1789, and according to the testimony of a respectable witness, who knew him well, he was during that time employed in the service of a merchant in Detroit; but some time between 1789 and 1792—for the time is not more certainly ascertained by the evidence, and the exact date is not material—John Hay, who was then about twenty years old, left Detroit, and went as a clerk in the service of Todd & Company, an association of merchants in Lower Canada, who were concerned in the Indian trade upon the Mississippi. When he was sent to school in Montreal some years before, he appears to have been consigned to the care of Messrs. Todd & McGill, and to have resided in the family of Mr. McGill, and his engagement in or about 1790 seems to have been a continuance of a connection which was altogether British in his character. The company, it appears, were

embarked in a new enterprise, which was interrupted, and, as it seems, put an end to by the death of Mr. Todd in the western country, in consequence of which, it is stated that John Hay remained at Michillimackinac, an island near the strait between Lake Huron and Lake Michigan, then occupied, like Detroit, by a British garrison, and for the same reasons, though it was within the territory of the United States as settled by the treaty of 1783. The case of *Macbeath v. Haldimand* (1 T. R. 172) shews that Michillimackinac was so occupied in 1785, and, as we know, it continued to be till surrendered in 1796 under Jay's treaty.

Strong evidence, as between these parties, that this was the home of John Hay so late as in the year 1795, or about that time, is afforded by the production of a letter in the hand writing of his brother, Richard Hay, under whose heirs the defendant claims, dated the 29th of August, 1795, and addressed to John Hay, at Michillimackinac, in which he says: "I have no news to write you, only that everybody expects you down here this summer." This seems to shew that up to that time it was not the impression in John Hay's family that he had abandoned Canada, or separated from his British connection. He seems about that time, or soon after, to have been sent from Michillimackinac occasionally with goods in a canoe to trade with the Indians on the Mississippi, either in what is now the State of Missouri, or in the opposite State of Illinois, or perhaps in both. The letter to which we have just referred, from Richard Hay, is marked on the back by John Hay as received by him on the 10th of November, 1795, at Illinois.

According to the testimony of Mr. Williams, an old and respectable witness, who was born at Detroit, and remembers well Governor Hay and his family, the whole territory from Vincennes, on the Wabash, to St. Louis, on the Mississippi, went, at that early day, under the name of the Illinois country.

We have no doubt from the evidence, that in or about 1795 or 1796, John Hay, having gone upon one of these trading expeditions, remained at or near St. Louis, then a French Canadian trading post on the west bank of the

Mississippi, and that in June, 1797, he married a young French Canadian woman, who was born in 1779 at Cahokia, in the territory which is now the State of Illinois, of French Canadian parents settled in that country. In the following year, 1798, or perhaps 1799, he seems to have removed to Cahokia, where he resided constantly from that time till 1826, and where all his children, fourteen in number, were born, except the first, who was born in St. Louis. In 1826 he removed to Belleville, another town in the State of Illinois, near to Cahokia, where he lived constantly till his death, which occurred in 1841.

With respect to the character in which he went to that country, somewhere between 1794 and 1797, (for the precise period is not fixed by the testimony) the conduct which he pursued, the relations which he sustained, what he assumed to be himself, and what impression was entertained of him by others, the evidence, as might be expected, is not altogether inconsistent, but for no other reason, we think, than from the different opinions which might be sincerely formed by different people, and the uncertainty that must attend accounts given from memory of matters so long gone by. The witnesses seem to be of a respectable class, and to have given their evidence with candour.

One witness (*Isidore LaCompte*) says he remembers well John Hay coming to Illinois—"he came from Canada; he was not a citizen of the United States, but a British subject at the time. At the time witness first knew him it was understood and believed always that he was a British subject. It was universally understood and believed in Cahokia at the time John Hay came there that he was a British subject, and had come from Canada to settle in Illinois." This witness first knew him at St. Louis; he came there as clerk with British traders, and removed a few years afterwards to Cahokia. Witness never heard him claim to be an American citizen, but that he was always received and recognized as such.

It is clearly proved that in 1809 John Hay held in the State of Illinois the office of clerk of a county court, and that from that time to 1839 inclusive he held various other public

offices in that state—viz., clerk of the Court of Common Pleas, for St. Clair County, and of the Circuit Court, and justice of the peace, recorder of deeds, notary public, and Judge of Probate. By some it is said that he had also been collector of customs and postmaster, which other witnesses deny.

The witness Isidore Le Compte, states his impression to be that it was necessary to be an American citizen in order to hold any of these offices.

Another witness (*Louis Le Compte*) deposes that he knew John Hay from the time he first came to reside in Cahokia till the day of his death; that he was a British subject, and came there with some British traders from Canada, where the witness understood he was born; that he does not know whether he must necessarily have been an American citizen to hold the offices which he did hold; that he always acted as a citizen of the United States, and had been recognized as such, but never claimed to be an American citizen, that the witness knows of—by which expression of never claiming to be an American citizen, I understand these and other witnesses to mean, that he never claimed to be exclusively an American citizen, and not a British subject.

Then *The Hon. John Reynolds*, who is a lawyer in the State of Illinois, and was for some years Governor of that State, swears that he knew John Hay from 1807 or 8, till the time of his death (in 1841)—knew him intimately, having served in the same office with him—always understood him to be the son of Governor Hay of Detroit; that he had been born and bred there while it was British territory, that he had been trading for two or three years in the north-west, and came from thence to St. Louis and Illinois about 1796 or 1798:—that witness knew he had been received and recognized as an American citizen; that the written constitution of the State of Illinois and the statute law require that persons holding offices under the State Government, such as those held by John Hay, should be American citizens, but that in practice persons are frequently elected and appointed to such offices who are not citizens; that John Hay never held any military office in the United States; that he is positive he took no part whatever in the war of 1812 between Great Britain and the United

States; and his impression is that his sympathies and feelings throughout the war were decidedly with Great Britain.

All the witnesses who speak on that point depose that he never served in any military capacity under the American Government, and did not bear arms in the war of 1812.

Another witness, *Nicholas Boismeneu*, deposes that he thinks John Hay first came to Illinois between 1790 and 1795, having first spent two or three years in the British north-west trading company after leaving Canada; that he lived near witness at Cahokia during the war of 1812; that he took no part in it; that it was the common impression in the neighbourhood that his sympathies were on the side of Great Britain, though he then held some of the offices spoken of; and that there was some talk of turning him out of office on the ground that he was a British subject.

The Rev. John Peck, who has written a history of that western country, knew John Hay, and says that it was a common impression that he was greatly attached to the British Government; that he thinks John Hay was not a citizen of the United States Government; that every white person in Illinois has the right of suffrage, and can hold any *clerical* office (by which I suppose he meant the office of a clerk in any court, &c.) and that it was not necessary for him to take the oath of allegiance to the United States. He adds, that he understood him to be a citizen of Illinois, in one sense—that is, as a resident inhabitant, but he thinks he was never recognized as a citizen of the United States in the legal sense of the term.

Antoine Smith swears, that he has lived 63 years at St. Louis; that he first knew John Hay in Montreal 64 years ago, (which may have been while he was there on a visit, after his return to Detroit in 1785); that two or three years after that, which would be about 1791 or 1792, he came to St. Louis with Todd's English Company, to trade with the Indians up the Missouri River; that upon Todd's death the company sold out their concern in the western country and went to Michillimackinac, and the next year Hay came with a canoe and merchandize from thence to St. Louis, and when he had sold his goods went and lived at Cahokia, and used to

go from thence to Michillimackinac for some time annually to buy goods. This is the most circumstantial account of John Hay's connection with Illinois, but it is not quite reconcileable with the other testimony.

Julie Jarrat went to live in Cahokia in January, 1798, and knew John Hay there. She swears that he had married and taken his wife from Cahokia to St. Louis, where he was living when the witness went to Cahokia in January, 1798, but that he came to live at Cahokia in that year, or the following. It was generally reported, she says, that he was a son of Governor Hay of Detroit; that he had come from Michillimackinac, and had been a clerk in the British north-west company.

The widow of Richard Hay deposes only from hearsay as to anything regarding John Hay, and she is altogether confused and in error as to dates.

John R. Williams, Esq., of Detroit, knew John Hay and his father and family; saw John Hay in Detroit in 1789, and thinks he went, not long after that, to the Illinois country upon some employment, and to reside there; and the Illinois country, he says, as then spoken of, embraced the north-west territory, including the Wabash River and country west of it. He believes that the offices held by John Hay could only be held by persons born citizens of the United States, or persons naturalized. (Whether John Hay was ever naturalized in the United States, by any legal formality, or ever took any oath of allegiance to that Government, does not appear.) He states that John Hay was born a British subject, but that he does not know whether he continued such or not. This witness was in Detroit when it was surrendered to the American Government in 1796, and he swears that John Hay was not then in Detroit, and that he thinks, but is not sure, that he then resided in the Illinois country.

Josephine Berthelote knew John Hay in Illinois from 1833 to 1836. She is a connection of the family, being a sister of Richard Hay's wife. She swears that she always considered Governor Hay and all his family to be British subjects; that John Hay was a clerk of Messrs. Todd & McGill, merchants of Montreal, and was living in the family of Mr. McGill while at school in Montreal.

Robert Abbott, Esq., an old and very respectable inhabitant of Detroit, deposes that John Hay lived in Detroit from 1783 to 1789—in which statement there must be some mistake, for he was clearly at school in Montreal in 1785, when his father died. He left Detroit, he says, in 1789, and went to Vincennes to reside: he says he does not know whether John Hay claimed to be an American citizen, or was received as such, but supposes he was, because he remained in the country after Jay's treaty.

Francis Baby, Esq., deposes that he knew John Hay in Detroit from 1784 till he left Detroit, which he thinks was about 1791, but is not positive, and does not know certainly where he went to. The surrender of Detroit by the British Government took place, he says, in June, 1796:—that Henry and Richard had both left it before the surrender, and that he never saw John Hay there after he left it, which he thinks was in 1791, and to go as he believes to Vincennes, in the Illinois country, now in the State of Indiana.

The widow of Governor Hay appeared to have died at Detroit in 1794, while that post was still occupied by a British force, and regarded as a British possession.

I have already stated what we think to be established as the general result of this evidence, which is somewhat conflicting, but not upon essential points; and it may be stated, in addition, that one of the witnesses swore that he had looked upon John Hay as a Roman Catholic; whether he was such or not is not more positively stated; his mother and his wife, the mother of the plaintiff, I have no doubt were both Roman Catholics. The question seems to have been asked with a view to the provision in some of the British statutes, which extends the privileges of subjects only to the children of foreign Protestants born abroad; but we do not consider, upon the facts of this case, that anything can turn upon the religion of John Hay, or of his son the plaintiff.

I have thus stated all that it seems to me can have any effect on the decision of the questions before us, and some things that it does not appear to me can be material, because it has been my desire to state the facts fully.

The alien laws of England have been found to give rise to

some questions rather difficult to solve, and especially in their application to the state of things which has followed the separation of the British Colonies in America from the crown. The several statutes which have been passed from time to time, have been found in some points obscure. This has been noticed as an inconvenient state of the law by a select committee of the House of Commons in England, who reported in June, 1843, on the state of the law affecting aliens, that so much doubt had arisen a few years before, in a case in which a party whose grandfather had been born out of the British dominions wished to establish his rights as a British subject, that out of ten lawyers who were consulted as to his right to inherit, five were of opinion that he could, and five that he could not.

Where there may be room for much difference of opinion on a question involving a right to property said to be worth some thousands of pounds, it is of consequence that the facts on which our judgment is to be formed should be very fully set forth. The conclusion which we have come to upon them I will endeavour to state more shortly.

We think it clear that neither John Hay the elder, called by the witnesses Governor Hay, nor his son Henry Hay, the patentee, could be in any manner affected by the treaty of 1783, which established the independence of the revolted colonies; and that they lived and died British subjects as much as if no such event had occurred.

Upon the death of Henry Hay in 1813, the estate, we think, devolved upon his elder brother John Hay, who was born a British subject, being the child of British subjects, born within the dominions of the British crown, Detroit being beyond all question British territory in 1769, the time of his birth. He had not, in our opinion, lost his *status* of a British subject in 1813, when Henry Hay died, nor indeed up to the time of his death, though he may have entitled himself to be regarded in the United States as an American citizen, and may have enjoyed all the rights of American citizenship. His claiming such rights, however openly and unequivocally, his enjoying them rightfully according to the laws of the United States, or usurping them wrongfully, if

he was suffered to do so, would not deprive him of his legal character of a British subject, nor would he lose that character by disclaiming to be a British subject, or even abjuring allegiance to the crown. I mean, that upon general principles of law it is true that he could not by any such conduct divest himself of his allegiance, and had no choice to exercise.

The only room for question is upon the effect of the treaty between Great Britain and the United States, signed in London on the 19th of November, 1794, and ratified in London on the 28th of October, 1795, commonly called Jay's treaty, which gave rise to the question in the case of *Sutton v. Sutton*, reported in 1 Russ. & M. 663, where the provisions of that treaty are set forth at large. Then, as to the effect of that treaty, we consider, in the first place, that John Hay, a British subject by birth, going in 1791 or 1792, or at some time before 1796, as it is clear he did, from Canada or from Detroit (then a British possession, though within the American lines,) to the American territory upon or beyond the Mississippi, as a trader from Canada, or in the service of British traders, was in no other position than any merchant or other inhabitant of Canada would have been, or any adventurer from England or Scotland, who might have gone at the same time, upon the same or any other employment, into any part of the same foreign territory. He was as clearly a British subject as any one of these could have been, and as entirely at liberty to go where he pleased and do what he pleased in any foreign country with which England was at peace, unless he was affected by circumstances which, taken in connection with the treaty, made his position different from theirs.

The second article of the treaty runs thus—"His Majesty will withdraw all his troops and garrisons from all posts and places within the boundary lines assigned by the treaty of peace to the United States. This evacuation shall take place on or before the first day of June, 1796; and all the proper measures shall in the interval be taken by concert between the Government of the United States and his Majesty's Governor-General in America, for settling the previous arrangements which may be necessary respecting the delivery of the said posts: the United States in the meantime, at their discretion,

extending their settlements to any part within the said boundary line, *except within the precincts or jurisdiction of any of the said posts.* All settlers and traders within the precincts or jurisdiction of the said posts shall continue to enjoy unmolested all their property of every kind, and shall be protected therein. •They shall be at full liberty to remain there, or to remove with all or any part of their effects; and it shall also be free to them to sell their lands, houses, or effects, or to retain the property thereof, at their discretion. *Such of them as shall continue to reside within the said boundary lines shall not be compelled to become citizens of the United States, or to take any oath of allegiance to the Government thereof, but they shall be at full liberty so to do if they think proper; and they shall make and declare their election within one year after the evacuation aforesaid; and all persons who shall continue there after the expiration of the said year, without having declared their intention of remaining subjects of his Britannick Majesty, shall be considered as having elected to become citizens of the United States."* (a)

A clear distinction is drawn in this clause between what was American territory generally speaking, as lying within the American boundary line settled by the first treaty, and such territory as was within the precincts and jurisdiction of the posts which were to be given up. They stand contrasted in the exception in the beginning of the clause; for the Americans were to be allowed to extend their settlements in the interval before the day fixed for the surrender, to any place within the boundary line, *except within the precincts and jurisdiction of the said posts.*

Now John Hay was not, on the 1st of June, 1796, nor at the time of making this treaty, residing at Detroit, nor, from anything that appears in evidence, within the precincts of that or any other post. He had gone from Detroit about 1791 or 1792, as he might have gone from Montreal or Glasgow; and when the posts were to be given up on the 1st of June, 1796, he was somewhere in the Illinois country, and in no other situation, we think, than Mr. Todd, the Montreal

(a) See this treaty, published at length in the edition of the Provincial Statutes of Lower Canada, printed in 1795.

merchant, would have been in, if, instead of dying in the interior of the country before 1796, he had been carrying on trade with the Indians, or residing at any place in the western country, not being within the precincts or jurisdiction of a post from which, in the words of the treaty, his Majesty's troops and garrisons were to be withdrawn.

That western country, no doubt, whatever general name it may at that period have gone by, either *the north-west territory*, or *the Illinois*, or *the Indian country*, was American territory, made independent of Great Britain by the treaty of 1783; and if John Hay, instead of being at school in a British province, had been living within the revolted colonies at the date of that treaty, and not in the service of the crown, but in such a condition that he might be entitled to avail himself of the acknowledgment of independence, by declaring his election to be an American citizen, no doubt he would, by such election declared or manifested in any unequivocal manner, have become an alien to the British crown; but he was not so situated that he had any election to make under or in consequence of that treaty of 1783, for that treaty gave no right to British subjects to betake themselves from under the dominion of the crown into the United States, at any time afterwards, and throw off their character of British subjects which they had retained unequivocally during the contest. It is clear that neither Governor Hay nor his son John Hay was in such a situation that he could be regarded as struggling for a separation from England during the revolutionary war, or in any manner avowedly or tacitly combined with those who were insisting upon independence. They were on the opposite side, as clearly as any of the troops were who were then garrisoning Detroit.

So that all clearly depends on the point, whether under Jay's treaty John Hay became an alien; because, residing at the time of the evacuation of the British posts, not within the precincts or jurisdiction of any such post, so far as we can see from the evidence, but in some part of the American north-western territory, he did not, within one year after the evacuation of the posts, declare his intention of remaining a subject of his Britannic Majesty.

In our opinion the treaty had not so extensive an effect, but was confined to those, who being at the time of the evacuation of these posts resident within the precincts or jurisdiction of some one of them, and so for the time under British rule, could be fairly considered as holding an equivocal and uncertain position against their will, and because their country had allowed the British flag to waive over them; and therefore at liberty, when the British force was to be withdrawn, to declare to which power they intended to adhere, in order that, if British subjects, they might not, by remaining within the precincts of the abandoned posts, be made aliens to the crown against their will.

We do not consider ourselves entitled to hold that under the terms of that treaty any British subject, who was at the time of the evacuation of Detroit residing in any American territory not within the precincts or jurisdiction of that fort, was under any greater necessity of declaring his intention of becoming (what he already clearly was) a subject of His Britannic Majesty, than if he had been residing at the time, as many hundred British subjects were, in New York or Carolina.

There was nothing equivocal in the position of John Hay while he resided on the Mississippi or the Illinois. All that could be said of him was, that he was a British subject residing in a foreign country, not at liberty to throw off his allegiance by swearing allegiance to the foreign country, or abjuring allegiance to his own, or by holding office or by acting in any manner as an American citizen, and therefore not subject to be treated as an alien because he had not proclaimed himself a British subject.

The case of *Sutton v. Sutton*, referred to in the argument (1 Russ. & M. 663), decides nothing in this case; for the judgment there turned upon a peculiar point not applying here, namely, that the title to the land in England was in an American citizen at the time of Jay's treaty, and so was under the protection of the ninth clause. Here at the time (1795), and for many years afterwards, the title to the land in question before us was in Henry Hay, who was clearly never an American citizen.

While we consider that John Hay did not in fact become

an alien, by reason of anything proved to have been done or omitted by him, taken in connection with the provisions of the treaty of 1795, we assume that if he had been shewn to have come clearly within those provisions as being a person resident within the precincts or jurisdiction of some post at the time of its evacuation, he might, by forbearing to make the election required of him within the limited time, have been deprived of his character of a British subject. If it could be made a question whether the second clause, standing as it does upon the royal authority alone, and not being among the provisions of the treaty recited and ratified by parliament in the statute of 37 Geo. III., ch. 97, and could have the effect which we assume it has—I forbear to enter into that question—my impression being that it could, though an argument might well be raised upon it, and my opinion being, that any rate the second clause does not take in the case of John Hay as it stands on the evidence, for I look upon him as being precisely like any other British natural-born subject, who not having been made independent of the British crown by the former treaty, might have gone from Lower Canada or any other part of the British dominions after the year 1783, to trade or reside in any part of the territory of the United States.

There remains, however, this other question—whether, admitting that John Hay inherited this estate in 1813, and was seized of it at his death in 1841, the plaintiff could succeed to it as his heir, being born as he was in the United States, in that territory which in 1818 was erected into the State of Illinois, and not being, as alleged, naturalized under any act of parliament, nor his disability aided by any enactment, British or provincial.

It is clear, we think, that none of our provincial statutes on the subject of aliens or of naturalization, have any application in favor of the plaintiff or against him. They were passed with a view to relieve from incapacity, on the ground of alienage of persons who had been resident in the province before their passing; and the last statute 12 Vic. ch. 197, sec. 12, will have a very extensive operation in relieving aliens altogether from incapacity to hold, transmit, or convey lands. But that is not retrospective in its operation,

and so does not extend to this case, where the persons claiming to be next entitled on account of the foreign character of this plaintiff have, before that act was passed, asserted their right, and sold the land to the defendant and another.

But we do not see here the slightest room for doubt that, if we are right in considering John Hay to have been at the time of the birth of this plaintiff, which it appears was in August, 1802, a natural-born British subject, the plaintiff must be capable of inheriting under the 4 Geo. II. ch. 21, which makes him a British subject to all intents and purposes. The words are "that all children born out of the legiance of the crown of England or of Great Britain, or which shall hereafter be born out of such legiance, whose *fathers* were or shall be natural-born subjects of the crown of England or of Great Britain, at the time of the birth of such children respectively, shall and may, by virtue of the act of the seventh year of the reign of her Majesty Queen Anne, and of this present act, be adjudged and taken to be, and all such children are hereby declared to be natural-born subjects of the crown of Great Britain to all intents, constructions, and purposes whatsoever."

Nothing can be plainer than that provision, which we take to be general in its operation, applying without discrimination to Roman Catholics as well as Protestants; and it is clear that none of the exceptions in the act can apply to this plaintiff. We think it also clear that there is nothing in the statute 13 Geo. II. ch. 7, or 13 Geo. III. ch. 21, or any other statute, which makes the civil rights of the children of natural-born subjects born abroad, and which they can claim under the 4 Geo. II. ch. 21, at all depending upon their taking the oaths and the sacrament, and making the declaration required of foreign Protestants, who are to be naturalized under the former acts. The provisions respecting the two classes of persons are perfectly distinct and independent of each other.

It is not material to consider whether under the early statute 25 Ed. III. stat. 2, ch. 2, or the stat. 7 Anne, ch. 5, the plaintiff would not have been equally entitled to the privileges of a subject, according to the case of *Bacon v. Bacon* (Cro. Car. 601), even though his mother should appear to have been an alien at the time of his birth. The doubt

raised on that point by what is said by the court in the case of Doe dem. Duroure v. Jones (4 T. R. 300) is unimportant since the passing of the statute 4 Geo. II. ch. 21, because, as the court remarked in that case, the parliamentary exposition of the law as contained in that act shows that thereafter at least the privilege was to be conferred upon the children of those whose fathers were natural-born subjects, whether their mothers were subjects or aliens.

The cases referred to in the argument of Sutton v. Sutton (1 Russ. & M. 663), Fitch v. Weber (6 Hare 51), Doe dem. Thomas v. Acklam (2 B. & C. 779), and Doe dem. Auchmuty v. Mulcaster (5 B. & C. 771), contain nothing that appears to be at variance with the opinion which we have expressed, but much the contrary. None of the cases which have been decided in this court have presented the same question, and nothing has been determined in them which seems to us to conflict with the view which we take of this case, regard being had to the circumstances of the claimant in the respective cases.

If we leave for a moment out of view the fact of John Hay being resident in the particular territory in which he was resident at the time of the evacuation of the British posts, and suppose that, being such as he was by his birth and his conduct and residence up to that time, he had happened to be at that period—viz., on the 1st of June, 1796—residing in the city of New York, or any other part of the United States in which the British Government had retained no posts or garrison since 1783, then the case of Auchmuty v. Mulcaster (5 B. & C. 771) would have been exactly in point, which Bayley, J., observed—"There is a very plain distinction between this case and that of Doe v. Acklam. In that case it appeared that the parent, through whom the claim was made, put off his allegiance at the time of the treaty, which enabled him to do so," (meaning the treaty of 1783). "Here Robert Nicholls Auchmuty took no such step at that time, and the law did not enable him to do so at any future time. He was, therefore, when residing in America after the treaty, in the same situation as if he had gone to reside in any foreign country, and his children are expressly within the statute 4 Geo. II. ch. 21, and entitled to the privileges of natural-born subjects of the King of England."

What is there said of Robert Nicholls Auchmuty is exactly applicable to John Hay, the brother of Henry the patentee, in the case before us, unless the fact of his residing in the years 1796 and 1797 in that part of the United States in which he did reside, taken in connection with the second article of the treaty of October, 1795, and with his not having declared his intention of remaining a subject of his Britannic Majesty within a year of the evacuation of the posts (as it is admitted he did not), places him upon distinct ground from Robert Auchmuty, and makes it proper to decide that he had ceased to be any longer a natural-born subject of Great Britain, and was incapable of holding the estate on the death of his brother in 1813; in which case there would be this double impediment to the plaintiff's recovery, that his father would have had no estate to transmit, and that the plaintiff would not come within the statute 4 Geo. II ch. 21, as not being born of a father who at the time of the plaintiff's birth was a British subject.

The case, therefore, seems wholly to turn on the point whether John Hay was a person coming within the second article of the treaty of 1795, and we think he is not shewn to have been in that position, but the contrary; for, as we have already stated, that clause, in our opinion, applies exclusively to the settlers and traders within the precincts or jurisdiction of the posts from which the British troops were about to be withdrawn.

"Such of *them*" (the act says)—that is, such of those settlers and traders within the precincts and jurisdiction of those posts as shall continue to reside within the said boundary lines, (that is, within the American boundary line)—shall not be compelled to become citizens of the United States, but will be considered as having elected to become such, unless within a year they shall have declared their intention of becoming subjects of his Britannic Majesty.

We think John Hay was not in the position described in this clause, being resident not less, I suppose, than 400 miles from Detroit, and not shewn to have been resident within the jurisdiction of that fort, or within the precincts or jurisdiction of any other post or place from which the British

troops were to be withdrawn, and that he therefore can have lost nothing by not having within a year declared his intention of becoming a subject; and it is also our opinion, that not having ceased to be a subject by the operation of that treaty, admitting that under the circumstances it might have had that effect, he did not lose his character of a British subject by birth, either from residing continuously in the United States, or from anything that he did while he was there.

Wherefore the plaintiff is in our opinion entitled to recover.

Judgment for the plaintiff.

OWENS V. PURCELL.

Case for suing out attachment in Division Court—New trial refused—Averments in declaration—Arrest of judgment.

In an action for maliciously suing out an attachment in the Division Court, it appeared that the defendant when he made the affidavit was aware that the plaintiff was then actually in prison. For the defence it was shewn that the goods attached were eventually sold under executions against the plaintiff, and therefore no substantial damage was suffered. The Court, however, refused a new trial on this ground, *the verdict being small*. In such a case it is proper to charge in the declaration that the defendant had no reason to believe that the plaintiff was about to abscond from *the Province of Canada* (not the *Upper Province* only), for that is what must be sworn to in order to obtain the attachment.

Where one count is good and another bad, and the damages general, the Court will not arrest judgment, but award a *venire de novo*.

CASE for maliciously suing out an attachment against the plaintiff's goods, from a Division Court, for the sum of £4 17s. 7d. when the plaintiff was not indebted to the defendant in that amount, and when the now defendant had no reason for believing that the plaintiff was then about to abscond from *the Province of Canada*, or to leave the County of Oxford, with intent or design to defraud defendant of his debt, taking away personal estate liable to seizure under execution for debt, or that the plaintiff was keeping himself concealed in any county of Upper Canada to avoid service of process.

In the second count, in which the action was rested on this latter ground, the affidavit alleged to have been made by the present defendant contained precisely those averments which the plaintiff charged that the defendant had no reasonable cause for swearing to. The case was tried at Woodstock before *McLean, J.* The jury found for the plaintiff and £18 damages.

Read obtained a rule nisi for a new trial on the law and evidence, and for misdirection ; or to arrest the judgment, on the ground that the allegation should have been that the defendant had no reason to believe that the plaintiff was about to abscond from the Province of *Upper Canada*—not the *Province of Canada*. He cited *Thompson v. Garrison*, E. T. 5 Vic. ; *McBean v. Campbell*, M. T. 6 Vic.

J. Duggan shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The attachment was taken out under singular circumstances, for it appears that when this defendant made the oath he was aware that the plaintiff *Owen* had been arrested on a charge of felony, and was then actually in prison. The defendant seems to have had his attention called to the impropriety of making such an affidavit under the circumstances, but he chose to persevere. It is only on that part of the affidavit which relates to the belief that the plaintiff was about to abscond from the Province of Canada, or to leave the County of Oxford, taking away his goods, with design of defrauding his creditors, that the action was supported ; for as to the existence of the debt sworn to, the defendant recovered £4 5s., only a few shillings less than he swore to—the amount being reduced by a set-off.

But, on the other ground, the whole evidence shews, we think, that the defendant proceeded recklessly and in an improper spirit, and abused the process given by law, but intended to be used under very different circumstances, as any man of common understanding must have known. It is true that the plaintiff seems not to have suffered any substantial damage, for the goods that were attached were sold eventually to satisfy executions that had been issued against the plaintiff's goods, so that they went, as they must at any rate have gone, to discharge his debt, and this defendant really received no benefit whatever from his attachment. That might have induced us to interpose, if the verdict had been large ; but as it is, we see no sufficient ground for granting a new trial.

The application to arrest the judgment remains to be disposed of.

If we thought the declaration bad on the exception taken, which regards only the second count, we should not arrest the judgment according to the practice now established, but order a *venire de novo*, the first count being good and the damages general; but, on consideration, we find nothing wrong in the second count.

Mr. Read referred to the cases of *Thompson v. Garrison* (E. T. 5 Vic.), and *McBean v. Campbell* (M. T. 6 Vic.), in this court, as supporting the exception; but, when carefully considered, these cases will not be found to apply to the point before us on the objection raised to the second count.

In those cases affidavits had been made, on which to sue out mesne process upon the statute of Upper Canada then in force, and the creditor had sworn in the usual and proper terms of the affidavit, that he was apprehensive the debtor would leave Upper Canada, &c. The plaintiff charged, as his ground for imputing malice, that the defendant had no reason to apprehend that he (the plaintiff) would leave the province, (which word, of course, comprehended the whole of Canada) without paying his debt. Issue joined upon that would not have placed the matter upon such a ground as could decide the action, because it was not necessary that the defendant should be apprehensive that the plaintiff would leave Lower Canada as well as Upper. It was enough, as the law of arrest then stood, if he entertained the belief that he was about to depart from that portion of Canada which constituted Upper Canada. The plaintiff, therefore, relied upon being able to disprove a ground for an apprehension which the defendant had not sworn to.

But this case presents a very different question. Here, as in those cases, the defendant swore to such an affidavit as the statute made necessary; but the difference in the present case is, that the plaintiff in his declaration has not gone beyond the terms of the affidavit. He does not, as the ground of this action, charge the defendant with not entertaining a belief, which he had not sworn he did entertain, (for that was the vice of the declaration in the cases referred to), but he negatives in precise terms his ground for making the very affidavit which he did make, and which it was necessary for him to

make before he could obtain his attachment. It is enough that the legislature has required an affidavit to be made that the creditor believes that the debtor is about to abscond from *the province*. The writ cannot be obtained without it, and that being so, we cannot hold it upon any legal principle to be no ground of action that he falsely and maliciously swore to a statement without which he could not have sued out the attachment and seized the debtor's goods.

Though we do not say that the fact is certainly so, yet we may assume from the act that the legislature probably thought fit only to grant this stringent remedy where there was ground for believing that the debtor was about to abscond from Canada altogether, leaving him to follow the debtor to Lower Canada, if he believed he was going there. It might fairly have been urged to the jury that there was no ground for imputing malice, if it could be shewn that there was any probable cause for believing that the debtor was about to abscond from Upper Canada, by which* means he would be withdrawing himself from the jurisdiction of our courts. But taking the affidavit and the declaration together, they are consistent with each other and with the effect of the statute, and we cannot hold that there is anything legally wrong in the way in which this declaration is framed.

Rule discharged.

JARVIS ET AL. V. DALRYMPLE.

Agreement—Sub-contractors of work on railroads bound by the measurement of company's engineer.

The plaintiffs entered into an agreement with the defendant, a contractor with the Great Western Railroad, by which they undertook to perform certain work on the road at the rate of 6d. currency per cubic yard, according to the estimate of the engineer in charge of the work.

The engineer proved that the work had been measured by him, and that the plaintiffs had received the full amount due to them according to this estimate. The plaintiffs called another witness, a civil engineer, who swore that he had also measured the work done by the plaintiffs, and found it to be more than it was estimated at.

Held, that the plaintiffs were bound by the measurement of the company's engineer, and that his report was conclusive upon them, as it ought to be, for the defendant would himself be obliged to adhere to it in his claims against the company for the same work.

The declaration in this case was on a special agreement under seal, whereby the plaintiffs agreed to perform and

complete in a proper and workmanlike manner, "*and to the satisfaction of the engineer of the Great Western Railroad in charge of the work thereby referred to,*" and by the 1st of May, 1853, and under the direction of the defendant or the said engineer, all the labour necessary to complete the borrowing of earth on the east side of Woodhull's Creek from ground that should be taken for that purpose by engineers from the land of Charles Woodhull, and also all the labour necessary for carrying what earth was left for borrowing on the west side of Benjamin Woodhull's, and depositing the same in, and constructing therewith an embankment, commencing at the east bank of Woodhull's Creek, and to be built of full width, &c., (giving further particulars of the work to be done) "*and for which work it was agreed that the plaintiffs should be paid by the said defendant six-pence currency per cubic yard, on or before the fifteenth day of each month ensuing the date of the agreement, for the work done by plaintiffs in the previous month, according to the estimate thereof of the engineer in charge of the said work, and deducting ten per cent. from the amount of the said engineer's monthly estimates until the whole of the said work should be completed, when the whole of the percentage so retained was to be paid to the plaintiffs by the said defendant. The plaintiffs then averred performance on their part of all the work to be performed by them, in the manner and within the time specified, and to the satisfaction of the engineer in charge of said work, as in the said agreement mentioned and required.*"

They averred also, that monthly estimates of their work done were made by the engineer in charge thereof for the defendant, and that although the plaintiffs during the progress of said work, from the 28th of September, 1852, to the completion thereof in May, 1853, in each month required the defendant to pay them the amount of the engineer's estimate of plaintiffs' work done by them during the month previous to such requirement of payment, according to the terms of the said articles of agreement, yet the defendant did not pay to the plaintiffs the amount thereof, &c.

The plaintiffs further alleged that although the defendant during the progress of the plaintiffs' work did, according to the agreement, retain in his hands ten per cent. on the engi-

neer's estimate of the plaintiffs' monthly work ; and although the plaintiffs, on completing the same on the 1st of May, 1853, notified the defendant thereof, and required him to pay the said percentage so detained, yet the defendant had not paid but refused to pay the same. And the plaintiffs declared that there remained due to them by the defendant for the said monthly estimates and percentage, the sum of £500, which the defendant, contrary to his covenants, hath refused to pay, &c.

The defendant pleaded, as to £468 15s. of the moneys in the first breach mentioned, that he paid the same before this action was brought, in full satisfaction of such sum and of the damages sustained by the non-payment thereof.

And, secondly, as to £81 5s., other parcel of the moneys mentioned in the said breach of covenant, he paid that amount into court.

The plaintiffs traversed the payments mentioned in the first plea. They replied that "the defendant did not pay to the plaintiffs the said sum of money in his said plea mentioned, nor did the plaintiffs receive or accept the same, in full satisfaction and discharge of the moneys due and damages sustained by the plaintiffs, as in the defendant's said plea alleged, &c." And they took out of court the £81 5s. paid in, as being in full satisfaction of the causes of action as to the said £81 5s.

Upon the trial at London, before *Robinson, C. J.*, the agreement was put in, which was precisely in the terms stated in the declaration. It was proved quite clearly by receipts produced, and by the evidence of one of the plaintiffs, who was examined at the instance of the defendant, that the defendant had paid to the plaintiffs at several times between October, 1852, and the 23rd of April, 1853, 2635 dollars, which, with the £81 5s. paid into court, made up £740 and a few shillings over.

And it was proved by Mr. Rowan, assistant engineer, doing duty on this section of the work, under Mr. Burrowes, the chief engineer, and who measured the work by Mr. Burrowes's direction, that 29,525 cubic yards of earth, and no more, had been removed by the plaintiffs under their

agreement with the defendant Dalrymple, who was the principal contractor with the company for the portion of the work in question. This, at the contract price of 6d. per yard, as agreed upon between the plaintiffs and defendant, amounted to £738 2s. 6d., so that the plaintiffs, upon this computation, appeared to have been rather over-paid.

But the plaintiffs, in order to support their claim to a considerable amount as yet due to them, called a person who swore that he was a surveyor and civil engineer; that at the request of the plaintiffs he had measured the quantity of earth removed by them, as pointed out to him by themselves, no one on the part of the defendant being present, and he found it to be 32,361 cubic yards.

It was sworn by a brother of the plaintiffs that he was present at the measurement by this witness, and had also pointed out the work to be measured, and did so correctly.

He stated that the plaintiffs, as he believed, had finished the work in February or March.

Another witness swore that he was another sub-contractor under this defendant Dalrymple, but had another job in what he called the same pit—that is, he had to execute a distinct part of the work agreed to be executed by Dalrymple for the railway company. He had not finished his portion, as he stated, when the plaintiffs had completed theirs. What was done by both he thought had been estimated at 44,000 yards, and he had been only paid for 12,000 yards. He declared he could not say whether he had been over-paid or not.

The plaintiffs claimed the difference between the 12,000 yards, which had been estimated for as done by Houston, and the alleged measurement of 44,000.

On the part of the defendant it was proved by Mr. Rowan, the company's engineer employed on the work, that he had measured separately in each month all that was done under the company's contract with Dalrymple, making only a rough or approximate estimate of the work in such monthly measurement, leaving the work to be accurately measured when completed, and before a final settlement.

Up to May, as he stated, the returns made to the office shewed 44,000 yards to have been removed upon the whole

of defendant's contract with the company, which included Houston's work as well as that done by the plaintiffs.

He swore that in February he had measured all that had been done by the plaintiffs, which was all then done in the whole pit, and found it 29,525 yards. He swore that they did no work after that, and that this measurement included all that they did; afterwards, in April, more work was done on that contract of defendant with the company, but not by the plaintiffs. He stated positively that 29,525 yards was the accurate measurement of what the plaintiffs did in all; that when he made the measurement he was resident engineer in charge of this work for the railway company, and made the measurement as such for the company, and that he was still such engineer at the time of the trial. He produced his certificate of measurement, and all the calculations, he said, were afterwards checked in the company's office. Anything done on the work after the witness measured the 29,525 yards done by the plaintiffs was quite distinct work. He explained that in making up the total estimate of the work done at the end of April upon the whole job, a mistake was made by one of the clerks in the railway office in adding up the new work to the 29,525 yards, which had before been certified for, which error made the 44,000 yards an over-estimate of the whole work done *at that time*; that this error having been discovered, the witness, as engineer, withheld from the defendant any certificate for the work done in May, as too much had been already estimated, and he left the error to be rectified upon the final estimate, as it had been, and the true quantity only had been allowed for to the defendant Dalrymple; so that, if anything should be recovered in this action by the plaintiffs, who had received full payment for the 29,525 yards, it must come out of the defendant's pocket, for he was bound by the measurement of the company's engineer, and had been settled with accordingly.

The learned Chief Justice told the jury that the agreement between these parties bound the plaintiffs to abide by the measurement of the company's engineer; that his report that all the work done by the plaintiffs was 29,525 yards was therefore conclusive in this action, and could not be overruled by the estimate of any other engineer employed by the

plaintiffs; and that it was most just to determine that, because otherwise the defendant, who could only draw his money according to the certificates of the company's engineer, would be left to pay any difference out of his own pocket, and there would be no limit to the litigation which such a course might give rise to, for probably no two engineers would agree in their estimate to a yard. He remarked, further, that if the error described by the engineer had not been discovered, and had had the effect of putting into the defendant's pocket, for a time at least, more than he ought to have received, that would not have the effect of entitling the plaintiffs to compel payment to them by the defendant for more yards of earth than the company's engineer certified to have been removed by them; but in truth the defendant, it was clear on the evidence, had not received more than was right, according to the estimate accurately made, for the error had been detected and made right before the defendant was settled with upon his contract.

The whole 6d. per yard had been paid, including the ten per cent. withheld while the work was in progress.

The jury however found for the plaintiffs, and £59 damages.

Wilson, Q. C., obtained a rule nisi for a new trial, on the ground that the verdict was against law and evidence and the judge's charge, or to shew cause why judgment should not be arrested.

Patterson shewed cause, and cited *Tay. Ev. I. 560*; *Wright v. Goddard*, 8 A. & E. 144; *Doe dem. Smith v. Pike*, 1 N. & M. 385.

ROBINSON, C. J., delivered the judgment of the court.

We think there is no ground for arresting the judgment, but that there must be a new trial, with costs to abide the event. There could be no clearer case than the present for holding sub-contractors to the express terms of their contract; for if this verdict should go into effect the plaintiffs would recover from the defendant a considerable sum of money, which the defendant would lose, for his contract with the company must estop him from recovering from them for more work than the engineer finds upon measurement to have been done under the contract. This is no dispute between

the plaintiffs and the company, but between the company's contractor and his sub-contractors, who refuse to abide by the express condition in their contract that they shall be paid according to the estimate of the company's engineer.

It is of consequence that parties should be held to the terms of their contract, or no one would be able to proceed with confidence in executing the works which are now in progress, and which are so important to the community. It would encourage litigation of a very harassing kind, and probably to a great extent, if parties were allowed thus to escape from their own agreements, and bring losses upon others contrary to the plain terms of their contract.

It is quite plain from the plaintiffs' agreement that they were well aware of the necessity which this defendant was under of abiding by the measurement of the company's engineer, and that they took this contract under him in such terms as bound them to abide by the same conditions. The defendant could not with prudence have sub-let the job on any other understanding. It was for the plaintiffs to determine whether they would come under those terms or not; but it does not rest with them, after they have subscribed to those terms, to depart from their agreement at their pleasure, and call in their own engineer, and insist that his measurement shall prevail over that of the company; and juries have no more right to relieve parties from their obligations than the parties have to relieve themselves.

Rule absolute, costs to abide the event.

SMITH V. MCGOWAN.

Declarations under 5 & 6 Wm. IV. ch. 62, sec. 15.

In an action of assumpsit for work done for defendant in Scotland, the only evidence given by the plaintiff was his own declaration, and that of three others, made at Glasgow, under 5 & 6 Wm. IV. ch. 62, sec. 15, taken before a justice of the peace. There was no authentication of the signature of the justice, or any proof of there being such a person, or of his holding this office. No notice had been given to defendant of the intention to produce such evidence; and he swore that the demand was unfounded, and that he believed he would be able to disprove it, if he could have the means of cross-examining the plaintiff's witnesses, and of adducing evidence on his own behalf.

Under these circumstances the court granted a new trial on the ground of surprise; reserving the question of costs, and expressing no decided opinion as to the sufficiency of the evidence so taken, though they condemned the incautious provisions of the statute.

Quere however, whether under the provision of the statute as to the effect to be given to such evidence, the want of an opportunity for cross-examination might not be taken as a ground for rejecting it altogether.

ASSUMPSIT on common counts.

Pleas—1. Non assumpsit. 2. Payment. 3. Set off.

At the trial at Hamilton, before *McLean, J.*, the only evidence given by the plaintiff's counsel in proof of the demand was,

1st. A declaration, not on oath, made by the plaintiff himself, at Glasgow, in Scotland, on the 12th of May, 1853, before a justice of the peace. It was entitled in this court and in this cause; and in it the plaintiff stated in substance, that the defendant, formerly of Glasgow, but then residing in Canada, was at the time of the commencement of this suit, and still is justly and truly indebted to him in £74 7s. 2d. sterling, besides interest, for work done and materials provided in building a house for defendant in the City of Glasgow, after allowing to the defendant credit for certain payments made by him, and for a small account of his against the plaintiff, which were particularly specified. The plaintiff declared in this statement of his that at the time of making it he was resident in the City of Glasgow, and specified in what part of the city he resided while he was performing the said work. He concluded his declaration by affirming that he conscientiously believed the same to be true, and that he made the declaration by virtue of the statute 5 & 6 Wm. IV. chap. 62, sec. 15, of which he set out the title. Besides attesting the due taking of the declaration at the foot thereof, opposite to the plaintiff's signature, in the same place in which the *jurat* of an affidavit is commonly written, a certificate of the justice of the peace, Alexander Dick, Esquire, was annexed to the declaration, in which he described himself as one of her Majesty's justices of the peace for the County of Lanark and City of Glasgow in Scotland, and stated that in pursuance of the act of Parliament 5 & 6 Wm. IV. (reciting its title) he thereby certified and made known that on the 12th of May, 1853, David Smith of the City of Glasgow aforesaid, plasterer, a person well known to him, and worthy of credit, came before him, and did by solemn declaration, which he made before the said justice, solemnly declare to be true the several matters and things related to and declared in the declaration annexed—"In faith and testimony whereof," (he

added), "I have hereunto set my hand and seal, at Glasgow aforesaid, this twelfth day of May, 1853," and he affixed his seal and signed his name, "Alexander Dick, J.P."

2ndly. The plaintiff's counsel produced declarations of three apparently indifferent persons, all resident in Glasgow, similarly intituled, made and attested, and corroborating the plaintiff's own declaration, such as would establish the demand satisfactorily and clearly, if evidence to the same effect had been given upon the trial in the usual manner, and were not disproved or shaken.

There was no authentication of the signature of the justice, nor any proof of any kind of their being such a person, or of his holding the office of justice—nothing further, indeed, than the declarations mentioned, with some accounts of measurements annexed, and the certificate of the justice as stated annexed to each declaration.

At the trial the defendant's counsel contended that these declarations did not constitute sufficient or legal evidence of the debt claimed to be due—there being no proof of the justice's official character, or of his signature or seal.

2ndly. That the declaration of the plaintiff himself was not admissible in evidence, the plaintiff being incompetent to give testimony in his own favor under our provincial statute, 16 Vic. ch. 66.

3rdly. That no such declarations can be admitted in our courts, where the defendant has not had an opportunity to cross-examine the declarant.

The learned judge considered that the statute made the declaration legal evidence, but reserved leave to the defendant to renew his application for a nonsuit to the court in banc.

Read accordingly obtained a rule nisi for a nonsuit upon the leave reserved, or for a new trial upon the law and evidence, and for misdirection, and for the reception of improper evidence. and on the ground of surprise.

The application in the alternative for a new trial was supported by an affidavit of the defendant, in which he swore that he was written to by his attorney in this cause, in a letter sent to his proper address in the township of Whitby, in Upper Canada, informing him that notice of trial in this cause had been served for the assizes at Ham-

ilton, and that he was required to attend upon the trial to be examined on the part of the plaintiff, by a notice that had been received; that this letter was written on the 24th of October last, but was not received by the defendant until the 12th of November, the assizes having been then many days in session, and this case having been then tried, of which he was apprised by his attorney by another letter received by the defendant on the same 12th of November: that he lived in the country three miles from the post office, and seldom sent for letters. He swore that he had been taken wholly by surprise by the manner in which the plaintiff had endeavoured to establish his cause of action, having been advised by his attorney that the plaintiff would have to produce witnesses in court in support of his demand, or to obtain evidence upon interrogatories administered under a commission, and that opportunity would be afforded to him of cross-examining the plaintiff's witnesses, and of producing evidence on his own behalf.

The defendant denied that the debt claimed was due, and said he believed he should be able to prove that it was not if he could have the means of cross-examining the plaintiff's witnesses and of adducing evidence himself.

This action was brought on the 29th of July, 1852, and the issues were joined on the 4th of March, 1853.

The defendant's attorney also made affidavit, that he had no notice or knowledge that the plaintiff intended to produce such declarations in proof of his demand: that he was taken quite by surprise upon the trial by the production of such declarations made *ex parte*, and not under oath, and had no opportunity of cross-examining.

Eccles shewed cause.

Read contra, cited *Campbell v. Hall*, 1 Cowp. 205; Co. Inst. Lib. IV. 286; Bl. Com. I. 108; Bowyer's Constitutional Law, 45, 48; Tay. Ev. I. 7, 15, 328, *Stinkeller v. Newton*, 8 Dowl. 579; *Gabriel v. Derbyshire*, 1 C. P. 432.

ROBINSON, C. J., delivered the judgment of the court.

It was not stated why the defendant, if he had any evidence that he could procure in Scotland upon commission,

did not take measures for obtaining it in the interval between March and November.

We entertain no impression favorable or unfavorable to the plaintiff's claim in this case. His demand is not large in amount, and is upon a cause of action of the simplest nature. It may be quite true, as he asserts, that the defendant owes him a sum of money as a balance due upon a building agreement executed in Scotland, and that he has come to this country without paying it. On the other hand, the defendant may never have owed him this sum, or may have paid it. We have nothing before us on which we could venture to form an opinion. It is therefore without reference to what may be the merits of this action, that we express the opinion that a suitor could hardly in any case stand on more favorable ground before a court than a plaintiff or defendant does, when he applies for the utmost protection we can give him against the operation of the very unequal law which the plaintiff is making use of in this case, and which allows of mere declarations not on oath being received as evidence, where the opposite party has had no opportunity of cross-examination, and without any provision being made for the due authentication of the statement so offered as testimony.

The statute, 5 Geo. II. ch. 7, (sec. 1), has the appearance of being rather a strong measure in favor of British creditors, but it required that the statements to be admitted as proof should be made on oath before the chief magistrate of some city or town corporate, and authenticated by the seal of such city.

The late statute, 5 & 6 Wm. IV. ch 62, is infinitely less guarded in its provisions, and it seems strange how such an enactment as the 15th clause of that statute could have found its way into an act of parliament.

It is scarcely too much to say that the communication between this province and England is attended now with less delay and trouble than the intercourse between some parts of the United Kingdom was in the fifth year of the reign of George II.; and when the reasons for suffering such a departure from the principles of evidence to continue as that statute authorizes are so very much weaker than

they were, one could not have expected that the Imperial Parliament would have consented to carry the incautious provisions in favor of the British creditor to so much greater a length. This last act substitutes a mere declaration for an affidavit, allowing it to be made before any justice of peace or other person authorized to administer an oath in Great Britain or Ireland, and requires it only to be authenticated by the private seal of such justice or other person; and, what is further peculiar in this new act is, that instead of this evidence (if it can be called such) being allowed to be used in colonial courts only in suits relating to any debt or covenant, which was the whole extent of the 5 Geo. II., this act 5 & 6 Wm. IV. makes them admissible not only in such actions, but also in all suits or proceedings, in law or equity, for or relating to any lands, tenements, or hereditaments, or other property situated in any such colony.

In this case the declarations were brought into court upon the trial, without any proof that there is, or was, such a gentleman in existence as Mr. Alexander Dick, whose name is subscribed to them, or that he was a justice of peace, or had power to administer an oath, or that the signature was in his writing. There is nothing to give us any assurance that these papers were not all written and subscribed in this town, the day before they were produced in our court.

Whether the statute really authorized such statements to be received with so little ceremony is one of the questions that has been raised, and it is one not so easy of solution as it might at first be thought, for we must conform to certain acknowledged principles in our decisions, and much will be found both in English cases and our own to warrant the dispensing with proof of the due taking under such provisions as this statute contains. In general documents coming from abroad which are made admissible, are received upon the bare production of them, assuming the signatures and seals to be genuine until the contrary is proved; and if this was not done the object of such enactments would be in a great measure defeated. But, looking upon the extremely unguarded nature of the provision which we are now considering, we are called upon certainly

to go to the utmost length of our legitimate authority in protecting parties against such abuses as might be practised under it.

The statute 5 Geo. II. ch. 7, has not been made use of in this colony in many instances. One of these was in the case cited from the Court of Common Pleas, of *Gabriel v. Derbyshire* (1 C. P. 422) where the statement of a plaintiff which had been transmitted was not received in proof of his debt, because the plaintiff's evidence would not have been admitted in his own favor if he had attended personally in court, or been examined under a commission; and this being so, it was held that the very words of the statute 5 Geo. II., and also of the later act, prevent the affidavit or statement of the plaintiff from being received.

In this case now before us, it seemed to be conceded that this declaration was made in a suit pending before our statute 16 Vic. ch. 19 was passed, and while the evidence of either party to a cause in his own favor was admissible, in which case it could not be rejected on that ground, and the declarations of the witnesses are not open to any exception of that kind; but they are not on oath, nor in any way authenticated, and the defendant has had no opportunity to cross-examine the declarants.

With respect to their not being on oath there is no question but that the Imperial Legislature has fully authorized that, by the insertion of this clause in a statute whose principal provisions had no reference to judicial proceedings for binding the rights of parties. As regards oaths of office very different considerations were involved. There was much to be said in favor of such a relaxation, and perhaps little or nothing against it: but we cannot think that, if attention had been called in either house of Parliament to the nature of the 15th clause, it could have been thought a safe or proper provision to adopt. Any one, I think, must know very little of human nature who imagines that it can be said with truth of men in general that they would take a false oath with as little scruple as they would make an untrue statement without oath. I do not believe that can be said with truth of one man in fifty. The sanction of an oath is unquestionably a great security.

Then, as to the manifest unfairness of admitting testimony which is to bind a man's rights to an extent that may utterly ruin him, when he has had no means of cross-examining the witness: we do not at present assume that the want of such opportunity of cross-examination may not properly be taken as a ground for rejecting the evidence in this or any other case, although we must admit that the legislature have taken no means for securing to a party the means of cross-examining, and have given no evidence that they had the necessity of doing so in view. The statutes both provide, however, that the affidavit or declaration when transmitted, shall in all actions and suits be allowed to be of the same force and effect as if the person making the same upon oath or affirmation had appeared, and sworn or affirmed the matters therein contained in open court, or upon a commission issued for the examination of witnesses, or of any party in such action or suit. Now nothing is more certain than that, as to the party, his evidence in open court or under a commission would not be heard in his own favor in our courts; and as to witnesses examined under a commission, it would be a decisive ground for rejecting their evidence, if it were made to appear that the opposite party had not had due notice and opportunity to cross-examine.

It may be found on fuller consideration, that without refusing to give the act its proper effect, some protection may be afforded to suitors by the construction given to the above proviso. But we have no doubt that in any case of this kind it is in the discretion of the court, upon the application of a party, to stay the cause until he has had the opportunity of examining the opposite party, according to our statute, upon a commission, or any witnesses resident abroad whose evidence he may require.

We therefore order a new trial, on the ground of surprise, reserving the question of costs to be considered hereafter. If the defendant does not within a reasonable time take out a commission, the plaintiff may move to discharge this rule; but the court will in that case consider whether the defendant is not at all events entitled to a new trial, without costs, on the ground that the evidence given was not legally sufficient to sustain this verdict. Rule accordingly.

ROBERTSON V. BROADFOOT.

Agreement—Illegality.

The plaintiff declared on a special agreement, not under seal, that in consideration that the plaintiff then being a bailiff of a division court *would do his duty as the law directed* in seizing and selling crops on the farm of one K., on account of a certain judgment obtained by defendant against one M., he, the defendant, then promised the plaintiffs to indemnify him against all risk that might arise in relation to *his doing his said duty*: that he did afterwards, *as the law directed*, seize and sell the crops on the said farm, by virtue of a warrant issued on said judgment, and that afterwards several persons claimed the said goods, sued the plaintiff, and recovered a verdict of £50, which he had been obliged to pay—yet that the defendant having notice of all this, refused to indemnify according to his agreement—A verdict having been found for the plaintiffs.

Held, on motion to arrest judgment, that the declaration sufficiently shewed that the plaintiff was required to do something which might possibly turn out not to be a legal execution of the process, and therefore that the agreement was not illegal.

Held also, that sufficient consideration appeared for the promise.

The plaintiff sued upon a special agreement, and set forth in his declaration, that on the 9th January, 1850, in consideration that the plaintiff, then being bailiff of the Fourth Division Court of the then County of Waterloo, at the request of the defendant, *would do his duty as the law directed* in seizing and selling crops on the farm of “Kinnettles,” on account of a certain judgment obtained by this defendant against one McNaught, in the said Divison Court, held in Fergus on the 26th December, 1849, he the defendant then promised the plaintiff to indemnify him against all risk that might arise in any manner or way in relation to the plaintiff’s *doing his said duty*.

The plaintiff then averred that, confiding in this promise of the defendant, he did afterwards, to wit, on the 10th January, 1850, *as the law directed*, seize and sell the crop, &c., on the said farm of Kinnettles, by virtue of a precept or warrant against the goods of the said McNaught, issued out of the said court, upon the said judgment, directed to the defendant as bailiff, &c. (setting out the warrant); and that, after the making of that warrant, and before the commencement of this suit, viz., on the 11th March, 1850, one Peter Paterson, and others named in the declaration, claimed the said crops on the farm of Kinnettles, and sued this plaintiff for seizing and selling the same under the precept and warrant aforesaid, and obtained a verdict for £50, on which judgment was entered, and payment enforced through an execution against the plaintiff’s goods,

of which the defendant had notice ; and the plaintiff complained that the defendant, in breach of his agreement, had not indemnified him.

The defendant pleaded, 1st. Non-assumpsit.

2ndly. That the plaintiff had not been damnified by reason of any matter or thing in the declaration mentioned.

3rdly. He denied that he had notice of the action against the plaintiff mentioned in the declaration, or of the proceedings therein alleged to have been had.

The jury found a verdict for the plaintiff for £13 17s. 6d.

Wilson, Q. C., moved in arrest of judgment. He contended that the agreement as set out would not support an action, for that it was an illegal undertaking, since the public officer could insist on no indemnity for merely doing his duty, which was all that by the declaration it appeared he was required to do ; and that no consideration was stated for the promise to indemnify, and none could be employed from the nature of the transaction. He insisted that to make this declaration sufficient, it ought to have been stated that the defendant had pointed out the crops on the farm as being liable to the execution, and desired the plaintiff to execute the writ upon them accordingly. He cited *Fletcher v. Harcot*, *Hutton* 55 ; *Arundel v. Gardiner*, *Cro. Jac.* 652 ; *Bridge v. Cage*, *Ib.* 103 ; *Corbett v. Hopkirk*, 9 U. C. R. 479 ; *Humphreys v. Pratt*, 2 Dow & Cl. 288 ; *Adamson v. Jarvis*, 4 Bing. 72 ; *Badow v. Salter*, *Sir W. Jones*, 65 ; *Stotesbury v. Smith*, 2 Burr. 924 ; *Betts v. Gibbins*, 2 A. & E. 57.

Lemon, contra, cited *Chitty on Contracts*, 439.

ROBINSON, C. J., delivered the judgment of the court.

This action being on an alleged simple contract, and not upon an undertaking under seal, no doubt makes the case more difficult to be sustained, because there is not only the question of illegality open, but there is also a necessity for shewing a valid consideration to support the promise, which is not in general necessary where the undertaking is under seal.

First, as to the alleged illegality of such an undertaking. To make the declaration bad on that ground we are not at

liberty to surmise illegality ; it must either appear plainly on the face of the declaration, or some facts must be stated in a plea which would shew it to be illegal.

I confess I have had some difficulty in coming to the conclusion that Mr. Wilson is not right in contending that this declaration does not set forth a legal cause of action ; for undoubtedly if a suitor should say to a public officer, " execute my process as your duty requires, and I will pay you such a sum," that would be an undertaking which could not be enforced ; for, besides the question of its being an illegal undertaking, since the officer should not be allowed to exact a gratuity beyond his lawful fees for only doing his duty, there would be the objection that the suitor would be binding himself without any sufficient consideration, since the law makes it the duty of the officer to execute the process.

But this promise, as set forth in the declaration, is not quite so naked in its character ; and we all think, upon deliberate consideration, that the declaration does state enough to place the plaintiff's case in a more favorable light. We must, as a general rule, always so construe the agreements of parties as to give them a natural meaning, if that can be done consistently with the words used, although such meaning may not be as plainly brought out as it might have been. We can hardly suppose the parties in this case to have meant this and nothing more—that if the plaintiff did his duty, and nothing more or less, whatever that duty might be, the defendant would save him harmless ; for he would be safe so long as he strictly executed the process, and meddled with no goods that did not belong to the debtor, and that would be doing no more than he was clearly bound to do. The declaration does, we think, shew sufficiently that the defendant required him to do a particular thing under the process, which possibly might turn out not to be a legal execution of the process, and against the consequence of which therefore the plaintiff might justly desire to be indemnified.

The declaration represents the defendant as saying to the plaintiff, " do your duty as the law directs, in seizing

and selling crops on the farm of Kinnettles under my judgment, and I will indemnify you against all risk that may accrue to you in any manner or way, in relation to your doing that duty." That is certainly not an undertaking as precisely drawn as any intelligent person acquainted with such matters would frame it, and it is most unwise for bailiffs to take upon themselves to draw up such writings; when they are not competent judges of legal forms, they should take care to have such papers drawn by those who are; but we think we may, without looking out of this agreement as set out in the declaration, and without doing violence to the language, regard the defendant as saying to the plaintiff, "Do your duty under my writ in selling as much of the crops growing on the farm of Kinnettles as will be sufficient to satisfy it, and I will save you harmless"—that is, "exercise your functions as bailiff in a proper manner, upon the crops there growing, assuming them to be liable upon my writ, and I will protect you against the consequences." That is what the parties must have meant, and what is said in the declaration imports that much. The defendant, by pleading over as he did, shewed that he understood the declaration in that sense. He did not object that it shewed no cause of action, but pleaded to the action such pleas as might naturally have been pleaded if the undertaking means what we have stated it to mean. Putting this construction on the language used in the declaration, there is nothing illegal in the undertaking to indemnify, and sufficient consideration appears for such a promise; and, in order to uphold the verdict we think we may properly understand the plaintiff, when he avers in the declaration that he did, as the law directed, seize and sell the crops on the farm of Kinnettles, as meaning—not that it was lawful to seize them whether they were McNaught's goods or not, but that he proceeded in a legal manner to seize and sell the crops which the defendant had required him to seize and sell, and that the damage he afterwards sustained was not in consequence of anything wrong done by himself, without the defendant's authority, in the manner of executing the process.

Rule discharged.

O'REILLY QUI TAM V. ALLAN.

Qui tam action for not returning conviction—Conviction illegal—Staying proceedings—Arrest of judgment—4 & 5 Vic. ch. 12, 12 Vic. ch. 81, sec. 7.

The defendant, a justice of the peace, with two other justices, convicted one D. S. of having refused to serve as returning officer at an election, and fined him 20s. It was afterwards discovered that this was not the first election for the ward, and therefore that the conviction was illegal. The conviction was not returned to the next quarter sessions, and thereupon, though after the return made, this action was brought for the penalty awarded by 4 & 5 Vic. ch. 12.

Held, on motion for a nonsuit, that the illegality of the conviction was no defence; but that, if on that account the fine had not been levied, a return should have been made explaining the circumstances.

Quære, whether the declaration would not have been bad on motion in arrest of judgment, for charging the offence to be that the defendant did not make a return to the next ensuing court of general quarter sessions, instead of an immediate return, as the statutes requires.

Quære, also, whether the court, if promptly applied to, would have stayed the proceedings, the action being brought after the defendant had returned the conviction.

The declaration charged that on the 10th of March, 1853, one Thomas Daly, then being town clerk of the municipality of the township of Peel, made information on oath, before Garrett Molloy, Esq., then being a justice of the peace for the united counties of Wellington and Grey, that one Daniel Spillan of the said township of Peel had been served with a warrant, under the hand and seal of the reeve of the said township, appointing him returning officer to hold an election in the fourth ward of the said municipality, and directing him to give due notice of the said election, &c., for the purpose of electing a councillor for the said ward—he, the said Daniel Spillan, then being a resident householder of the said fourth ward—and that the said Daniel Spillan refused to act as such returning officer, &c., contrary to the statute, &c.; and the declaration then averred that the said justice, Garrett Molloy, summoned Daniel Spillan to answer to the said charge on the 18th of March, before him and others of her Majesty's justices in and for the said counties; that Daniel Spillan appeared at the time and place, &c., before this defendant, Charles Allan, so being a justice of the peace, &c., and William Reynolds and George Barron, two others of her Majesty's justices of the peace for the said counties, whereupon the said Daniel Spillan did confess that he had refused to act as returning officer, and had returned the warrant to the clerk of the

municipality; and the said justices, upon such his confession, convicted him of the offence, and adjudged him to pay a fine of one pound for the offence aforesaid, to be paid and distributed according to the statute; that it thereupon, according to the statute in such case made and provided, became and was the duty of the defendant, so being such justice as aforesaid, to return such conviction to the then next ensuing general Quarter Sessions of the peace for the said united counties, yet that this defendant, so being such justice, and not regarding his duty, &c., did not make a return of the said conviction in writing under his hand to the next ensuing general Quarter Sessions of the peace for the said united counties after the said conviction took place, and although a reasonable time had elapsed after the said conviction took place and before the said next general Quarter Sessions of the peace, but neglected and refused so to do, contrary to the force of the statute, &c. : whereby, and by force of the statute, &c., the defendant hath forfeited £20, and an action hath accrued to the plaintiff, who sues, &c., to demand from the defendant £20; yet, &c.

Plea—Nil debet.

At the trial at Guelph, before *Macaulay, C. J.*, it appeared that Spillan, being himself a candidate at the election in question, which was held in January last, declined for that reason to accept of the appointment to be returning officer, and being informed against, and summoned to answer as set forth in the declaration, he acknowledged that he did refuse, and stated his reason, and was fined twenty shillings. The defendant Allan, Barron, and Reynolds made the conviction—two other justices, Wilson and Molloy, as having been concerned in the election, declined acting. The conviction was made on the 18th of March last. The next court of general Quarter Sessions of the peace was held on the 5th and 6th of April following, but the return of convictions, which included this conviction of Spillan, was not made until the 30th of April, and it was filed in sessions the 25th of June following. That was a joint return made by this defendant and the other justices

(Reynolds and Barron), and it stated the conviction to have been made by these three justices. The fine of twenty shillings was to be paid on the 1st of April.

Mr. Reynolds was examined as a witness on the part of this defendant, and swore that he joined the defendants in making the conviction, under 12 Vic. ch. 81, sec. 7, and that Wilson and Molloy, having been objected to, retired. This justice swore that the fact of the election in question not having been the first election for the ward, did not occur to them while they were making the conviction, but that he afterwards thought their conviction was illegal.

The fine had not been paid, and had not been enforced. The omission seemed to have been by fault of the person who usually acted as clerk to the justices.

The learned Chief Justice directed the jury, that if the election referred to was not the first that had been held for the fourth ward, which it seemed certain it was not, they should find for the defendant, because the statute only made it an offence to refuse to serve as returning officer at the first election. He also instructed them that the delay in transmitting the return, was evidence of neglect on the part of the defendant.

The jury found for the plaintiff, and £20 damages.

It was objected by the defendant's counsel on the trial, that the justices had no jurisdiction to convict for an offence in refusing to serve as returning officer except at the first election for the ward; that by the statute 4 & 5 Vic. ch. 12, a conviction made as this was, is required to be returned immediately, and not at the next ensuing general Quarter Sessions; that the declaration therefore did not charge the offence properly; also that this action should have been against the justices jointly. Leave was reserved to move to enter a nonsuit.

Wilson, Q. C., obtained a rule nisi to shew cause why a nonsuit should not be entered upon the leave reserved, or why a new trial should not be had upon the law and evidence. He cited 12 Vic. ch. 81, secs. 5, 6, 7, 185; King v. Burrell, 12 A. & E. 460; King v. Share, 3 Q. B. 31.

Irving shewed cause, and cited Metcalf *qui tam* v. Reeve and Gardner, 9 U.C.R. 263, 12 Vic. ch. 81, sec. 31 sub-sec. 29.

ROBINSON, C. J., delivered the judgment of the Court.

If this case were before us on a motion to arrest the judgment, we might perhaps find that there was a material defect in the declaration in not charging the offence in the very words which the statute, under the circumstances of the case has made it proper to use—namely, that the justices (this being a conviction by more than one justice), did not make an immediate return thereof to the Quarter Sessions, instead of making the offence consist in their not having made their return to the next ensuing court of general Quarter Sessions. It may seem that the one is equivalent to the other; but for the reason suggested in the argument, (that the court of Quarter Sessions might be sitting at the time of the conviction,) it might be difficult to hold it to be so. We have only to consider, however, whether there is ground for granting a nonsuit or new trial, and we cannot satisfy ourselves that there is any such ground, though we have every inclination to relieve against the verdict if there was any ground which would warrant our interposing. It certainly seems to be a vexatious proceeding to sue for the penalty after the defendant had returned the conviction, although some delay had taken place in making the return. Whether, under such circumstances, this court, if it had been promptly applied to, could properly have stayed the proceedings, need not now be discussed. The action has been brought, and has gone to trial, and the only question is, whether the verdict that has been given, was right upon the evidence. We are of opinion that we cannot but hold that it was. We do not doubt that anything that would shew that the defendants had not incurred the penalty, could properly be given in evidence under the general issue; but we do not think it was any defence on the part of the justices, that they had made, as it seems they had, an illegal conviction, as they afterwards discovered, and therefore made no return of it. They did make a conviction in fact—not an imperfect one, but one upon the face of it good, and which they could not but acknowledge to be a conviction, though the grounds may not have been such as entitled them to

convict. If when they found that the penalty was only imposed for refusing to act as returning officer at the first election to be made for the ward, they resolved, as it seems they did, that they would take upon themselves to forbear enforcing the small fine, which they had imposed, as they afterwards believed, in error, their obvious course was to make the return as the law directed, and at the same time to explain in their return that they had not collected the fine, and did not intend to do so, because they doubted the legality of the conviction.

But they were bound under the statute to return all their convictions, whether they proceeded to collect the money or not. The object of the legislature in passing the act 4 & 5 Vic. ch. 12, was to compel the justices to make a return of whatever fines they had imposed, in order that their diligence in collecting the fines might be quickened, and also in order that it might be known what money they should admit themselves to have received, so that they might be made to account for it. It is plain the justices could no more be justified in withholding fines which they had received upon illegal convictions, than those received upon convictions that were legal; but if we were to hold that they were justified in omitting to make the return because their conviction had been made contrary to law, we should be making a determination that would sanction great abuse.

It is plain indeed that the justices did not omit making the return for any such reason. It was a mere neglect of their clerk, for they did make it a few days after they ought to have made it. We regret that any one should have taken such a course under the circumstances as the plaintiff has taken here, but the provision of the statute is plain, and we see no ground for interfering with the verdict.

Rule discharged.

BOYLE V. WARD.

Attachment from Division Court—on what grounds to be issued—discrepancy between 64th clause of 13 & 14 Vic. ch. 53, and form of affidavit in schedule D.

In trespass for taking goods the defendant justified under an attachment from a division court of Lincoln and Welland, which he averred to have been issued on his (the defendant's) affidavit that the plaintiff *was about to abscond* from this province, or leave the said counties of Lincoln and Welland, with intent and design to defraud him of his said debt, *taking away personal estate* liable to seizure under execution for debt.

Held, on demurrer, plea bad—the affidavit neither averring those facts which by the enacting clause of the statute are made the conditions on which an attachment may issue, nor answering to the form of affidavit given in the schedule to the act.

Semble, as there is a material difference between the enacting clause and the form of affidavit given, that the former must govern.

This defendant, being sued in trespass for taking goods of the plaintiff, justified under an attachment issued at his instance from a Division Court of the united counties of Lincoln and Welland. He first set out a debt due to him by the present plaintiff, and then averred that being apprehensive, and verily believing that the plaintiff *was about to abscond from the province, or that he was about to leave the said county of Welland*, with intent and design to defraud him of his debt, taking away personal estate liable to seizure under execution for debt, he made an affidavit of his debt, and therein stated and swore that the said Michael Boyle, the present plaintiff, *was about to abscond from this province, or leave the said counties of Lincoln and Welland, with intent and design to defraud him of his said debt, taking away personal estate* liable to seizure under execution for debt, &c.

To this plea the plaintiff demurred, assigning several causes of which the following is the only one material to be noticed :

That the plea shews no justification, because the statute (13 & 14 Vic. ch. 53) does not authorize issuing an attachment unless the person against whom it shall issue *shall have actually absconded*, taking personal property liable, &c., or shall attempt to remove such personal property either out of Upper Canada, or from one county to another therein, or from Upper to Lower Canada ; or should keep concealed within any county in Upper Canada to avoid being served—whereas the plea asserts that the plaintiff *was about to abscond* from the province, or leave the said counties, taking personal property ; thus neither affirming that the plaintiff

had absconded leaving personal property, nor that he had attempted to remove personal property.

Ball for the demurrer.

Miller contra.

ROBINSON, C. J., delivered the judgment of the court.

The statute 13 & 14 Vic. ch. 53, sec. 64, only authorizes a plaintiff to sue out an attachment from the Division Court, when his debtor *shall abscond from the province* (not where the creditor shall merely *apprehend* that he is about to abscond), and when he has absconded leaving personal property liable to seizure ; or where the debtor shall attempt to remove his personal property, either out of Upper Canada, or from one county to another therein, or from Upper to Lower Canada ; or shall keep concealed in any *county of Upper Canada to avoid service of process*.

Then there is the form of an affidavit given in a schedule, and the act provides that upon producing an affidavit of the purport of that given in the schedule, the creditor may obtain an attachment.

According to this form the creditor should swear that he hath good reason to believe, and *doth believe*, that the debtor *has absconded* from this province, *and hath left personal property* liable to seizure under execution for debt within the county of ——— ; or, that the debtor *is about to abscond* from this province, or to leave the county of ——— with intent and design to defraud the creditor of his debt, taking away personal property liable to seizure under execution for debt ; or that the debtor is concealed within the county of ——— to avoid being served with process.

It will be perceived that this form is inconsistent with the enacting clause (64th). The clause gives as one condition of the writ issuing, that the debtor *shall have absconded* from the province leaving personal property. The form specifies another condition, relating to absconding from the province, which is not to be found in the clause ;—namely, where the creditor hath reason to believe and *doth believe* that the debtor is about to abscond from the province. The clause specifies another alternative, that the creditor

shall *attempt* to remove his personal property out of Upper Canada, or from one county to another therein, or from Upper to Lower Canada. The form says, that when the creditor shall swear that he has good reason to believe that the debtor is *about to leave* the county of —— with intent to defraud his creditor, taking away personal estate liable to seizure, &c.

It seems as if one person had drawn the act and, another the form, each setting down, without much regard to the opinion of the other, what in his opinion might properly form the foundation of the process. Where both cannot be followed, it must be that the enacting part of the statute shall prevail and not the form, which must be so far departed from as to make it correspond in substance with the enacting clause. It would have the appearance of hardship, it must be confessed, to hold the creditor to be a trespasser for acting upon a writ sued out upon an affidavit following the very form given in the act, but still that hardship might arise. In this case, however, the defendant sued out his writ upon an affidavit not conforming either to the enacting clause or to the form in the schedule, unless it can be conceived that that form is meant to admit of stating all the terms of the affidavit in the alternative ; for he swore, as he tells us in his plea, that the present plaintiff *was about to abscond from the province or leave the counties of Lincoln and Welland with intent to defraud him of his debt, taking away personal estate.*

This is altogether in the disjunctive, notswearing to a belief in any one thing in particular more than another ; and as each particular of these alternatives is independent of the other, each of them singly must be enough to warrant the writ under the statute, by being complete in itself which certainly is not the case here, for the first thing he swears is, that the *debtor was about to abscond from the province*, and he relies on that as sufficient, if it be true, for supporting the writ for all that follows is in the disjunctive, whereas the 64th clause requires that if the ground be the absconding from the province, the creditor must swear to an actual absconding by the debtor, leaving personal property behind him, instead of a belief that he is about to abscond, taking his property with him.

And then, again, this affidavit instead of stating that the debtor had *attempted to remove* his personal property from one county to another, states that the creditor believes that *he is about to leave* the united counties taking away his personal property, which latter statement involves no assertion of an attempt to remove.

It is to be remarked that what the statute provides is, that if any debtor shall abscond or shall attempt to remove his goods then the creditor may sue out the attachment making an affidavit of the purport of that in the schedule. It is only on condition of the existence of some one of the facts enumerated in the 64th clause, that the creditor is at liberty to act at all upon such an affidavit as that contained in the schedule; and an actual *absconding* or an attempt to remove his goods, or keeping concealed, seems indispensable; not one of which facts is asserted in the declaration to have existed or is stated to have been sworn to.

We have considered whether we could allow the form to over-rule the act, and we do not feel clear that we could do so. Then this being process from an inferior court, not of record under which the plaintiff's goods have been taken from him, the defendant cannot justify under the writ without shewing that those circumstances existed which authorized him to sue out the writ. The attachment might protect the officer who seized under it, but not the party who obtained the writ upon an affidavit not merely irregular and informal, but not shewing in substance any such facts as made it legal to issue the writ.

As a test we have only to imagine that, notwithstanding what is enacted in the 64th clause, the form in the schedule had contained, as one of its terms, that the creditor believed that the debtor was about to remove from one township into another, or that he had refused to give him a note for his debt; could we hold that an attachment might issue upon such an affidavit? I think not.

DRAPER, J.—Confining attention to the enacting clause alone, there is a material difference between the facts stated in the plea to have been sworn to, and those upon which it is made lawful to issue an attachment. The affidavit set forth is,

that the plaintiff was about to abscond, taking with him personal property. All this points to an act about to be done, not yet commenced, whereas the statute contemplates and requires an *attempt* to remove ; in other words, the affidavit charges only an intention, the statute an act. It is true the affidavit complies with the form in schedule D. ; but the statute requires not only that such an affidavit should be made, but also that a given state of facts should exist before it shall be lawful to sue out any attachment. It may be sufficient to state no more in the affidavit than is set forth in the form given, but more seems to me requisite to make the plea good ; and I think it is insufficient for the omission.

No notice of exception to the declaration was given, but the defendant objects that an action of trespass will not lie under the circumstances set forth in the plea. But I do not think we can assume as of course that the plaintiff is suing for the taking his goods under the warrant of attachment stated in the plea, or that he may not prove some other trespass wholly irrespective of it.

BURNS, J., concurred.

Judgment for plaintiff on demurrer.

WILLIAMS v. RAPELJE ET AL.

Practice—Irregularity—Waiver of service of process, and of appearance.

A writ of summons was issued in the *Common Pleas*, and an appearance entered thereto in the same court. The plaintiff then filed his declaration in the *Queen's Bench*, and served it with a demand of plea about the 16th of June. This demand of plea was returned by letter by the defendant's attorney on the 4th of July, with an acceptance of service endorsed, and no notice was then taken of the discrepancy. Interlocutory judgment was signed on the 29th of June ; and on the 5th of September notice of assessment was served, no pleas having been sent in the mean time. The plaintiff's attorney was not asked to waive the judgment, and he therefore went on and assessed damages according to his notice. In the next term the defendant moved to set aside the assessment for irregularity—not stating in his affidavits that there was in fact any defence.

Held, that the defendant's attorney, by his conduct, had waived the want of service of process, and of appearance.

This was an action against a sheriff and his sureties on their covenant, for the non-performance by the sheriff of the duties of his office, alleging as a breach the non-payment of a sum levied by him on an execution against the goods of one Abraham Countryman at the suit of the plaintiff.

Judgment by default—damages assessed at £15 11s. 2d.

McMichael for the defendants, moved to set aside the verdict on the ground of irregularity, because no writ of summons was ever issued in this cause, and no appearance entered by the defendants, or either of them, and on grounds disclosed in affidavits.

The facts were these :—On the 2nd of April, 1853, the plaintiffs sued out a writ against these defendants, *in the Court of Common Pleas*, in an action of covenant, which was served on the defendants soon afterwards, and the sheriff instructed Mr Foley, an attorney, to defend his suit.

The writ was sued out by Mr. Scatcherd, as plaintiff's attorney.

On the 9th of May, Mr. Foley entered appearance in the office in London in this suit *in the Common Pleas*.

On the 11th of April Mr. Foley wrote to the plaintiff's attorney, Scatcherd, in London, that he had been instructed to defend in *Williams v. Rapelje* and others, and he sent an acceptance of service of writ, (which must have been the writ issued from the Common Pleas). He also sent an appearance which he requested Mr. Scatcherd to have entered for him, and he asked him to forward the declaration. Mr. Scatcherd seemed to have been under an erroneous impression that he had brought the suit in this court,—though his *præcipe* certainly was for such a writ as he obtained and had served—that is from the Common Pleas ; for on the 16th of June he filed a declaration *in the Queen's Bench* as in this cause, and at the same time sent a copy to Mr. Foley whom he had employed also as his agent to have the writ from the Common Pleas served.

The declaration and demand of plea enclosed to Mr. Foley were entitled in this court, and Mr Foley was requested to return the demand of plea with admission of its being served, and was told that if he would forward his pleas, he, Mr. Scatcherd, would have them filed for him, and would accept service in the same way.

On the 4th of July, M. Foley's partner, Mr. Smart, wrote to Mr. Scatcherd, returning him his demand of 'plea, with acceptance of service indorsed and signed by Mr. Foley, excusing himself for not having sent it sooner, but taking no

notice of the discrepancy between the declaration and the process, in regard to the court in which the cause was tried.

The plaintiff's attorney signed interlocutory judgment on the 29th of June.

The defendant's attorney, Mr. Foley, sent no pleas; and on the 5th of September Mr. Scatcherd sent to Mr. Foley notice of assessment and damages for the assizes at London, to be holden on the 26th of September, to be served on the defendants, also a notice that the plaintiff would require the defendants to appear upon the trial and be examined on his behalf.

On the 28th of September Mr. Foley's partner wrote to Mr. Scatcherd respecting another suit, but made no allusion to this suit of *Williams v. Rapelje* and others, in which the declaration and demand of plea had been served in June, and notice of assessment given on the 17th of September.

The plaintiff's attorney went on and assessed his damages at the assizes. When he enclosed the notice of assessment to Mr. Foley he stated to him that he supposed no defence was intended, and requested that he would return the notice with an acknowledgment of service, but this was never done.

Mr. Scatcherd swore that he was never requested to waive his interlocutory judgment and allow pleas to be filed, and that if he had been he would have readily done so; that he knew there could be no defence, the action being on the sheriff's own return that he had made the sum indorsed on the writ of *fi. fa.*, being about £72 besides interest. He swore that he proceeded all along in good faith, and was astonished afterwards to find that the defendants had moved to set aside the assessment, for that he allowed the sheriff whatever credit he was entitled to, and took a verdict only for the balance really due.

A letter written by the sheriff, and which was put in on the trial, also shewed that there was in fact no defence.

M. C. Cameron shewed cause, and cited *Vaughan v. Ross et al.*, 8 U. C. R. 506.

ROBINSON, C. J., delivered the judgment of the court.

There is no doubt that there has been an irregularity arising,

we suppose from a mistaken impression of Mr Scatcherd that he had taken out his writ in this court. His interlocutory judgment, as well as all his papers after the first process, were filed and entitled in this court, in which no appearance was ever entered by the defendants or their attorney.

The question is, whether, as Mr. Foley, the defendant's attorney must have been well aware that Mr. Scatcherd was proceeding as in a cause pending in this court, the defendants should be allowed now to take advantage of an irregularity of which they gave no notice, and suffered the time from the 17th of June to November to elapse, and all the expense of the assessment to be incurred, without taking any steps to set the irregular proceeding aside.

The Nisi Prius record, as well as interlocutory judgment paper, states this cause to have been commenced by a summons issued from this court on the 2nd of April, 1853, the day in which the writ in fact issued from the Common Pleas.

The sheriff is an officer of this court though his sureties are not. He has acknowledged on record the debt which was sued for in this action, and no affidavit is now made that all for which a verdict is given is not due, or that there is any defence which could be urged. The sheriff's letter, written before the action was commenced seems to preclude any doubt as to the justice of the claim.

Then we have here a declaration delivered to his attorney and entitled in this court and demand of plea in the case so entitled, and returned with service acknowledged, and notice of trial served more than two months afterwards not returned, nor any notice given of an intention to take exception on the ground of irregularity, but the plaintiff allowed to go down and assess his damages; and in November (in term the defendants for the first time move against the proceedings, because the process had issued from this court, and because interlocutory judgment was signed without appearance entered.

It is not indispensable that process should be taken out and served. A defendant may agree to accept declaration, dispensing with process, and this is very often done; though the omission to take out a writ in the Queen's Bench in this

case did not arise from that cause, but was accidental. Still a plaintiff may send to a defendant, or to an attorney for him a declaration, in a cause, leaving him to acquiesce in the want of service of process, or not as he may determine; and if the defendant accepts and retains the declaration, and a demand of plea, and acts as if he had appeared in the cause, he cannot, we think, after so long a delay, and allowing the plaintiff to proceed as if all were right, come at the latest stage of the proceedings and object that he had not appeared.

If the attorney had in this case entered an appearance that would have cured the want of service of process; the only object of which is to bring the defendant into court.

Then if an appearance would have cured the want of process, will not the acting by the attorney as if he had appeared, cure the want of appearance?

Williams v. Strahan (1 New Rep. 309) is strong on that point. There the ground of objection was that interlocutory judgment had been signed, though the defendant had not appeared. It was answered, that the defendant had by his conduct waived the want of appearance, by accepting a declaration, and acting as if an appearance had been entered; that his conduct amounted to an undertaking to appear; and that as the court would have compelled him to enter an appearance, they would not now suffer him to insist on the want of it as an irregularity.

It was insisted on the other side, that as the defendant had done no act since the judgment he could not be considered as having waived it.

But the court said, that as the defendant had acted as if as if an appearance had been entered he should not now be allowed to assist upon the want of it, there being no irregularity which might not be waived. There is every appearance in this case of the defendant's attorney lying by, with full knowledge of the irregularity, in order to throw the plaintiff over the assizes, and with that view suffering him to take one step after another in ignorance of it. The case of *Helmes v. Russel* (4 Dowl. 487) is a strong authority against this application.

Rule discharged.

RISCHMULLER ET UX. V. UBERHAUST.

Husband and wife—Misjoinder.

Where a married woman, during her husband's absence from the country, lent to defendant a sum of money, taking the following acknowledgment—"19th June, 1849. I, the undersigned, owe to Mrs. Charlotte Rischmuller, at Stratford, the sum of three hundred dollars"—and in an action on this writing, brought on the common counts only *by the husband and wife*, the jury found that it was the husband's money lent by the wife. *Held*, that the wife was improperly joined, and that the plaintiffs must be nonsuited.

ASSUMPSIT on common counts.

Pleas—Non-assumpsit, and set-off.

At the trial at Stratford, before *Robinson, C. J.*, the proof of debt was a writing given by defendant as follows:—"19th June, 1849. I, the undersigned, owe Mrs. Charlotte Rischmuller, at Stratford, the sum of three hundred dollars."

The declaration contained no count setting out the writing; and the only one of the common counts under which the demand could be recovered was the count for money lent, in which the plaintiffs sued for this money as "money" (not saying whose money) "lent by the said Charlotte Rischmuller, she being then the wife of the said William Rischmuller."

It was proved that Mrs. Rischmuller (the wife who joined in the action) lent this money to the defendant during her husband's absence in New York. It did not appear that the husband knew anything of the transaction at the time it took place. The defendant had been working for the husband on his farm, and during the husband's absence he prevailed on Mrs. Rischmuller to lend him the money to be sent to Germany to pay the expense of bringing his family out to this country. When asked to repay this money he pretended that it had been given to him, not lent.

The learned Chief Justice told the jury, that if the money belonged to the husband and was lent by the wife in her husband's absence, either with or without his authority, he ought to have sued alone for it, the wife having no legal interest in the cause of action:—that if (which was not shewn by any evidence) the money had been the money of the wife before her marriage, or had been given to her, or in some way acquired by her since her marriage,—in either case, it

would be assets of the wife reduced to possession during coverture, and in her hands, and so would be the money of the husband, for which he alone should have sued. He desired the jury, upon what was proved to them, to find whether the money lent was the husband's money, or had been in any manner the sole property of the wife. They found expressly that it was the husband's money lent by the wife, and they gave a verdict for the plaintiffs for £94 17s. 10d., leave being reserved to the defendant to move for a nonsuit, on the ground that the wife, upon the facts proved could be no party to the suit, and that there could legally be no recovery except by the husband alone.

Eccles obtained a rule nisi accordingly.

Cooper shewed cause, and cited *Weller et al. v. Baker*, 2 Wils. 424; *Philliskirk et ux. v. Pluckwell*, 2 N. & S. 393; *Howard et al. v. Okes*, 3 Ex. 140.

Grey supported the rule.

ROBINSON, C. J., delivered the judgment of the court.

We have a strong disposition to support this verdict if we can, for the debt no doubt is an honest one. The husband has allowed the wife to join in the action. The demand could no doubt be enforced in an action by the husband alone, and it would only be harassing the parties uselessly to prevent the money being recovered in this action. Still that consideration could not prevail against the defendant, if we should see that the verdict cannot be upheld without violating legal principles.

In *Starkie's Evidence*, 3rd Ed. vol. ii. p 59, it is stated to be the general principle that a misjoinder of plaintiffs is a ground of nonsuit. In *Bidgood v. Way et ux.* (2 W. Bl. 1236) the objection was taken upon error brought; and in 1 Ch. Pl. 38, it is stated, that if the wife is joined where she should not be, the defendant may demur, or may move to arrest the judgment. This shews that a good legal reason for joining the wife as plaintiff should appear in the declaration. No such reason is shewn here, any further than that it is averred that the money was lent by her while she was the wife of the

plaintiff. If so, it must *primâ facie* have been the husband's money, whether it had been her's before marriage or not; but here it is expressly found that it was the husband's money, and no doubt it was so, or we should have some proof to the contrary, or the plaintiffs would at least have made affidavit to that effect.

Assuming then that it was the husband's money, how does the case stand? The count for money lent states the fact truly, that the money *was lent by the wife*, unless we are bound to look upon it as lent by the husband alone, through the wife as his agent. But then the question arises, does an assumpsit arise to pay the wife as well as the husband upon such a transaction, admitting that the money was the husband's? In a very late case of *Dalton v. Midland Railway Company* (17 Jur. 719), the Lord Chief Justice of the Common Pleas says, "If a wife takes her husband's money, and lends it, taking a promissory note for it payable to herself, the wife may be joined in the action with her husband." Here is a case stated very like the present, except that the promise is there supposed to be made expressly to the wife, and the action is supposed to be brought upon the note, which we have no doubt might be supported in the name of the two. Here we have no express promise to the wife, but the mere fact that in a writing, which is not sued upon, the defendant admitted himself to owe the wife three hundred dollars, which three hundred dollars, it is found, were the husband's money. Can the husband be permitted to allow the joinder of his wife in the action upon a demand so wholly belonging to himself, where there has been no express promise made to the wife? It seems to me that *King and wife v. Basingham* (8 Mod. 199, 341) is strong against it, because it would have the effect of turning the assets of the husband into a wrong channel, if after recovery by both the wife should survive him. The case of *Gaters v. Madley* (6 M. & W. 423) is very material in its application to this case, as shewing the case in 2 M. & S. 293, on which the plaintiff's counsel relied in this case, to be only authority that the husband and wife may sue on a *promissory note* given to the wife alone during coverture. Here, if the writing did constitute a note, it was

not declared upon; and we cannot, we fear, hold that the writing in this case is a promissory note (a).

McKEAND ET AL. V. MORTIMORE AND WIDEMAN.

Partnership.—Liability.

The defendant M., having been in business alone, was indebted to the plaintiffs for goods. He then entered into partnership with W., on the understanding that W. should share in the profits, and be liable for the debts, from the commencement of M.'s business. *There was no written agreement between them.* After this arrangement W. was introduced to the plaintiffs by M. as his partner, and M. & W. together purchased from the plaintiffs to a considerable amount. W. then retired from the firm. *There was no evidence to shew that the plaintiffs were aware of the arrangement between M. & W.*

Held, that such arrangement, without the assent of the plaintiffs, could not convert the separate debt of M. into the joint debt of the firm; and therefore that W. was liable only for the goods supplied after the partnership.

ASSUMPSIT for goods sold and delivered, and on an account stated.

The defendant Wideman pleaded *non assumpsit*, and the defendant Mortimore suffered judgment by default. The issue was tried at the fall assizes for 1853, at Toronto, before *Draper, J.*, and a verdict rendered for the plaintiffs for £664 1s. 1d., with leave reserved to the defendants to move to reduce it to £347 1s. 9d., under the following circumstances:—

The defendant Mortimore opened a retail store in the country about the beginning of October, 1851, and carried on business for some months on his own account. During that time he purchased goods from the plaintiffs, and on the 1st of April, 1852, was indebted on that account to them in the sum of £316 19s. 4d. About January, 1852, Mortimore made some proposals to Wideman about their going into partnership, and in the March following, according to the evidence of Mortimore, they agreed to become partners. Wideman brought no capital into the business, but it appeared that he was the owner in fee of a farm of some value; and it was agreed that he should share in the concern as if he had had been a partner from the commencement of the business in October, 1851, and should be liable together with Mortimore for all the existing liabilities—the business being

(a) See *Cosio et al. v. De Bernales*, 1 C. & P. 266.

still carried on, as it had been, in the name of Mortimore alone. After the arrangement had been concluded between the two defendants, and about the 1st of April, 1852, they came together into Toronto, and Mortimore introduced Wideman to the plaintiffs as his partner, and they then purchased goods to a considerable amount. The joint business was put an end to by Wideman withdrawing from it in July, 1852; and it appeared that between the 1st of April, 1852, and Wideman's retiring, the plaintiffs had supplied them with goods to the amount of £347 1s. 9d. There was no evidence whatever to shew that the nature of the arrangement between the two defendants was made known to the plaintiffs when Mortimore introduced Wideman to them as his partner, or that they were apprised of it until after Wideman retired.

The jury were requested to say whether Wideman did enter into partnership with Mortimore on the understanding that his liability was to relate back to the commencement of Mortimore's business, and if so to find for the plaintiffs for the whole amount due them—£664 1s. 1d. They found that Wideman entered into partnership on the agreement that his liabilities should commence with the commencement of Mortimore's; and that the goods furnished since the partnership commenced amounted to £347 1s. 9d. Leave was reserved to move to reduce the verdict to this sum.

In Michaelmas term *M. Vankoughnet* obtained a rule nisi accordingly, citing *Ex parte Kedie et al.*, 2 Dea. & Ch. 321; *Hargreaves v. Parsons*, 3 M. & W. 561; *Eastwood v. Kenyon*, 11 A. & E. 438.

Freeland shewed cause, relying on *Ex parte Lane*, 1 De Gex 300, reported also in 16 L. J. Bankr. 4, where it was held that a parol agreement is sufficient to convert a separate into a joint debt, such an agreement not being a promise to answer the debt of another within the Statute of Frauds, but the creation of a new debt in consideration of the former being extinguished.

DRAPER, J., delivered the judgment of the court.

The case cited by the plaintiffs' counsel is also reported

in 10 Jur. 382. It was decided by the Court of Review. The application was for leave to prove a debt on the joint estate of L. senior and L. junior, bankrupts. The debt was originally due from L. senior, to the petitioner before the partnership. No partnership articles were executed, but the banking account of L. senior, was altered to the joint names of the two, and the petition alleged that the debt due to the plaintiffs had been treated by all parties as the joint debt of the father and son, and not of the father alone.

The Chief Judge (Sir J. L. Knight Bruce), expressing his decision as a judge of fact, stated his conclusion on the evidence—that the debt due originally by L. senior, had by the understanding of the partners become the debt of the firm; and further, that “that understanding was communicated to the creditor, who distinctly acceded to it;” and “that it was, in effect, agreed between the three that the separate debt of the father should become the joint debt of the father and son;” and considering that the effect of such agreement was for a valuable consideration to extinguish the first, and for a valuable consideration to substitute for it the second debt, he determined in favor of the petitioner.

The facts of the present case fall very short of those on which this decision is rested. Here there is nothing to shew that the understanding between the two defendants was ever made known to the plaintiffs, and therefore there can be no inference, and there certainly is no direct proof, though one of the plaintiffs was examined as a witness, that the plaintiffs ever acceded to the arrangement. In the absence of such proof the case is little more than that of a party owing a debt taking a partner into his business; a transaction which *per se* certainly does not make the in-coming partner liable for the previous debt. Nor does the arrangement between themselves have that effect, because that arrangement cannot affect the rights of the previous creditor without his assent; and it appears to us too late to express that assent, which it may be said is sufficiently shewn in the progress of this cause, after the in-coming partner has retired from the concern.

We think the rule should be made absolute.

Rule absolute.

JARVIS V. MORTON.

Error in marking posts of original survey.

A mistake of a surveyor in marking the number of the concessions wrong on some of the posts of an original survey, will not make it proper to describe the lots so marked as being in the concession numbered on the posts.

TRESPASS *qu. cl. fr.* and for taking trees from broken lots 26 and 27 in the 2nd concession of Belmont.

Pleas: Not guilty, and pleas denying that the close was the plaintiff's, or the trees, &c., his.

At the trial at Belleville, before *Burns J.*, it appeared that the patent for these lots issued on the 2nd of March, 1836, to James Fitchett, from whom Mr. Jarvis purchased; and it described these lots thus—"commencing where a post has been planted at the south-east angle of said lot 26 in the second concession, then north 16 degrees west 60 chains, more or less, to where a post has been planted at the north east angle of the said lot 27; then south 74 degrees west 7 chains 75 links, more or less, to *Duck Lake*; then southerly, following the different windings and turnings of Duck Lake, till intersected by the allowance for road between lots 26 and 25; then north 74 degrees east 36 chains 50 links, more or less, to the place of beginning; containing 92 acres, more or less."

There was clear evidence that the lots which the plaintiff claimed to be those embraced in his patent had been stripped of a very large quantity of pine timber that was growing upon them. The damages given could not upon the evidence be said to be excessive, and the defendants gave no proof of any right that they could have supposed they had to strip the land of all its timber. Their defence consisted in an attempt to shew that the lots from which they took the timber were not the lands owned by the plaintiff—namely, 26 and 27, in the second concession of Belmont; but were in fact lots numbers 26 and 27, in the third concession, and so were not the lands to which the plaintiff had made title.

There seemed to have been an obstacle found in the original survey to continuing the second concession line from one end to the other of the township, by reason of several small lakes which presented themselves, and which were

supposed to cover a larger portion of the township than they did in fact. The line, which had been regularly posted from No. 1 up to sixteen along the second concession line, was in consequence run no further in that direction, but was afterwards intended to be completed by running down from the opposite end of the township, and there was reason to believe, from the evidence given by several witnesses of the manner in which some of the posts were marked in making this latter survey, that the surveyor who ran it imagined that he was completing the third concession line when in fact he was completing the second, for several of the posts which he planted were marked *2nd concession* on the one side and *3rd concession* on the other, when they should have been marked *1st* and *2nd concession*.

The jury, under the direction of the learned judge, found a verdict for the plaintiff.

Wallbridge moved for a new trial on the law and evidence, and for misdirection, and for excessive damages.

Cur. adv. vult.

ROBINSON, C. J., delivered the judgment of the court.

It is impossible to attend to the evidence given without being satisfied that this case was not properly left to the jury, but that the jury have also disposed of it properly.

The field notes and the plan from the government office shew that these broken lots fronting on the lake were beyond all doubt in the second concession, and an error of the surveyor in marking them *third* instead of the second concession, could no more place these lots in the third concession than it could make them part of the tenth concession, if he had happened by any blunder so to have marked them.

What the defendants contend for would annihilate the second concession, and leave no concession between the first and the third. It would have the effect of placing half of the lots along the same concession line in one concession and half in another, and would deprive all those of their lands who hold patents for lots in the second concession numbered higher than sixteen.

The statute is very explicit in making the posts set to mark the front angles of lots unalterable boundaries, so that, whether the space between them be wider or narrower than it ought to be, the position of the posts must determine the actual width of the lots; but it does not consecrate every palpable error that may have been committed in numbering the posts, otherwise the survey might be made wholly confused and inconsistent; as in this instance, the third concession would be the next to the first, or if you recognize the next to the third to be the second concession, then there is no first concession, at least after lot 16.

We find no ground for setting aside the verdict.

Rule refused.

ADDISON V. CORBEY.

Award--Power of arbitrators.

Where a reference is general, as of a contract and all matters relating to it, the arbitrators have power to name a day for paying the money; though it is different where only the matters in dispute *in a cause* are to be decided upon.

This was an action of debt to recover the sum of £58 2s. 6d. with interest, due from the defendant to the plaintiff upon an award.

The cause came on to be tried before *McLean, J.*, at Hamilton, when a verdict was found for the plaintiff for £70, subject to the opinion of the court upon a case stated, of which the following are the material facts:—

On the 10th of March, 1853, the plaintiff and defendant entered into an agreement under their hands and seals, reciting that certain differences had arisen between them respecting certain work done and contracted to be done by the plaintiff in and about the shop and premises occupied by the defendant; and that they had agreed to submit the same to the arbitration and award of W. T. and H. C., and such third person as they might appoint, or any two of them, upon the terms thereafter expressed, in the event of disagreement; and containing mutual covenants that they would abide by the award of the said W. T. and H. C.,

&c.; and that the arbitrators should have "full power to enter upon and decide all matters connected with the said work, and the said matters relating thereto so in dispute."

Under this submission the arbitrators, on the 26th of March, 1853, awarded that the defendant should pay to the plaintiff the sum of £63 2s. 6d., *within the space of fourteen days from the date of the award.*

It was admitted that the credit for the work done and materials provided by the plaintiff for the defendant had expired at the time of the reference, and was not a matter in dispute between the parties; and that the writ of *capias* in this cause was issued on the twenty-ninth day of March last.

The question for the opinion of the court was, whether the arbitrators had power under the submission to extend the time for payment of the sum awarded; and if the court should be of opinion that the arbitrators had not such power, then a verdict was to be entered for the plaintiff for the sum of £58 2s. 6d., with interest from the twenty-sixth day of March last; but if the court should be of a contrary opinion, then a nonsuit was to be entered.

Freeman, for the plaintiff, cited *Benwell v. Hinxman*, 1 Cr. M. & R. 935; S. C. 5 Tyr. 509.

Read, contra, cited *Russell on Arb.* 399; *Morphett, In re*, 2 D. & L. 967; *Freeman v. Bernard*, 1 Salk. 67; *Royston v. Rydall*, Rolle. Abr. H. 8. p. 250; *Booth v. Garnett*, Str. 1082; *Anon.*, 1 Keb. 92; *Kockill v. Witherell*, 2 Keb. 838; Com. Dig. "Abitrament," E. 15; *Coke v. Whorewood*, 2 Saund. 337; *Brown v. Watson*, 6 Bing. N. C. 118.

ROBINSON, C. J., delivered the judgment of the court.

This case presents a question on which the authorities have seemed to us to be very conflicting. Certainly the language of the court in *Benwell v. Hinxman* is strong and decided. "There is no doubt," Baron Parke says, "that the arbitrator had no authority to give day of payment. So far, he has exceeded his authority, and so

far the award is invalid, but it is valid for the rest." As to the latter part of this *dictum*, that the award must be valid for the rest in such a case, Lord Eldon seems to have leaned strongly to the contrary conclusion in *Emery v. Wase* (8 Ves. 519): "Though I agree an award might be good," he said, "if the excess" (in giving time for payment) "was distinct from the rest, I cannot satisfy myself that time of payment has not some connection with the price. I cannot admit that to be clearly excess, without connection with valuation."

But it is very material, we think, to notice that what Baron Parke held in *Benwell v. Hinxman* was held in a case in which *a cause* had been referred, and nothing else; and there the arbitrators have only to put themselves in place of the jury, and give their award as a verdict; and it seems quite reasonable to hold that they can no more give time for payment than the jury could have done if the case had gone to trial.

Here the contract and all matters relating to it were to be arbitrated upon: and to determine that on a reference of that kind the award cannot fix a day for paying the money, would be to go counter to daily experience and practice, for it is the common course to name a day in the award for paying the money, and often to direct it to be paid by instalments.

It is true we sometimes see expressed in submissions that the arbitrators are to find what amount is due from either of the parties to the other, and to direct "when, where, and in what manner the same shall be paid; but according to my observation, I should say that in the greater number of submissions there are not such words, or anything equivalent, and yet that the awards made under them do generally name a day for paying the sum awarded.

In *Russell on Arbitration*, 399, and in the other text books, it is laid down very distinctly that the arbitrators may name a day and place for paying the money, and numerous authorities are referred to which fully support this. The exceptions, I take it, are where a cause only is referred, or where a reference is made for no

other purpose than to make an estimate, or fix a price, or where the terms of the submission contain something restricting the arbitrators in this respect.

In this case we think the arbitrators did not exceed their authority in giving fourteen days to pay the money, and it follows that a nonsuit must be entered, as the action has been commenced too soon.

CLARK V. ORR.

Detinue not maintainable.

The defendant, having a claim against one R., sued out an attachment from a division court, under which he directed the bailiff to seize certain goods in the house where R. was living with the plaintiff, and he was present when such seizure was made. The goods were placed by the bailiff in the custody of the clerk of the division court, in whose possession they continued until the bringing of this action.

Held, that as the goods were seized in the possession of the defendant in the attachment, an action of *detinue* could not be maintained against this defendant, even admitting the goods to be all the time under his absolute control, without shewing that the plaintiff had made him acquainted with her claim, and demanded to have them given up.

This was an action of *detinue*, for detention of the plaintiff's goods and chattels.

Plea—General issue “by statute.”

At the trial at Woodstock, before *Burns, J.*, at the last spring assizes, *Miller*, in opening the case for the plaintiff, stated that the cause of action was that the defendant having a debt or claim against Mrs. Rennet, had sued out a warrant of attachment from the division court against her goods. Mrs. Rennet and the plaintiff, her daughter, lived together. The defendant, the plaintiff in the warrant of attachment, had directed the bailiff to seize, and was present when the goods were seized under the attachment: and the bailiff took all the goods, and placed them in the custody and possession of the clerk of the division court, as directed by law to do; and the goods were still in the possession of the clerk. He contended that the defendant was liable in *detinue* for the goods, on the ground that he had the control of the suit in the division court, and had directed the bailiff to seize them.

The learned judge thought that *detinue* could not be

sustained against the defendant under the circumstances, and in deference to this opinion the plaintiff took a nonsuit.

Eccles obtained a rule nisi to set aside the nonsuit for mis-direction, and for a new trial.

Read shewed cause.

It was contended on the argument, on the part of the defendant, that *detinue* does not lie when the goods at the time of the action brought are not in possession of the defendant. The plaintiff, on the other hand, contended that it would lie, wherever it appeared that the goods at the time of the action brought were either in the possession or *under the control* of the defendant, and that it would lie in this case because the bailiff held the goods under the attachment issued at the now defendant's instance, and therefore subject to his control; and, besides, the defendant was present in person and directed the bailiff to seize the particular goods which this plaintiff now claims.

ROBINSON, C. J., delivered the judgment of the court.

It seems clear, we think, on numerous authorities, that it is not indispensable to shew that the defendant in the action of *detinue* had possession of the goods when the action was brought; if he had possession of them before, that may suffice.

In the case of *Jones v. Dowle* (9 M. & W. 19) the court say, "*Detinue* does not lie against him who *never had* possession of the chattel, but it does lie against him who once had, but has improperly parted with the possession of it."

The question therefore in this case is, whether we can properly hold that this defendant ever had such a possession of these goods as will support *detinue*. If, indeed, he can be said ever to have had such a possession, he had it at the time this action was brought; for nothing had occurred in the meantime to alter his position, unless the provisions of the statute 13 & 14 Vic., ch. 53, sec. 64, can properly be said to have done so from the time that the goods have been placed in the custody of the clerk of the division court.

I have had a doubt on the question whether the goods can or cannot be treated as being all the time in the actual possession of the defendant, upon the principle that they

were attached at his suit, and on his own particular direction given to the officer. This, it may be argued, constituted the bailiff his servant or agent, and in like manner made the clerk his agent when the goods came into his possession, to be detained under the defendant's process.

But it is said that the gist of the action of detinue is the detention, and this detention is in contemplation of law a breach of an actual or implied undertaking, in consequence of an alleged bailment, to give them up. Hence it is that debt and detinue may be joined in an action, but trespass and trover cannot be joined with detinue. This seems to shew conclusively that what will subject a person to an action of trespass or trover will not necessarily afford ground for an action of detinue; and that it does not follow, because trespass or trover could have been maintained by the defendant by reason of his connection with the process and with the act of seizing the goods, that detinue will therefore lie. It is necessary that he should have had possession of the goods. In replevin, the landlord who authorized the distress is sued in general jointly with the bailiff; but that is in its character an action of trespass; and no doubt here, as in those cases, what was done by the defendant would be clearly sufficient to charge him as a trespasser; and if he had received the goods by an actual bailment from the plaintiff, his giving them afterwards wrongfully out of his possession would not relieve him from being answerable in detinue, if upon a demand made he could not and would not restore them. That has been several times decided. But the mere act of trespass here, to which (if it was a trespass) this defendant was a party, would not of itself give a right of action in replevin, unless the defendant retained the goods and refused to give them up on demand; and to maintain detinue against him, even admitting that the goods were all the time under his absolute control, it was necessary, we think, that the plaintiff should at least have made him acquainted with her claim, as the goods were seized in the possession of the defendant in the attachment, and demanded to have them given up.

Rule discharged.

CONROY V. MCKENNEY.

Held, (before the passing of 16 Vic. ch. 179) that magistrates were not liable for refusing to admit to bail on a charge of misdemeanor, in the absence of any proof of malice.

This was an action on the case against two magistrates, for refusing to admit the plaintiff to bail upon being arrested for examination.

The declaration stated that the plaintiff was charged with an assault upon, and pointing a pistol at one Laurent Robideau, and that he was arrested and brought before the defendant McKenny, who postponed the examination of the matter; that thereupon he applied to the defendants to be admitted to bail to appear before the justices, and offered sufficient sureties for the purpose, but that the defendants, wrongfully and maliciously intending to injure and oppress the plaintiff, and to keep him in prison and in custody, absolutely refused to accept bail.

The defendants pleaded the general issue "*per stat.*" with other pleas.

At the trial, at the last assizes at Sandwich, before *Robinson, C. J.*, it appeared by the evidence that the plaintiff was arrested on Saturday, and brought before the defendant McKenny about candle-light in the evening, and he postponed the investigation of the matter till Monday morning, but refused bail, thinking the matter of too serious a nature to admit the plaintiff to bail. The other defendant was consulted by McKenny, and he also thought the charge so serious that the plaintiff should not be admitted to bail, and so both acted upon the same opinion. The witnesses for the plaintiff all negatived the idea that the defendants were actuated by any malicious motives in doing as they did; and therefore the charge of malice could only be sustained by reason of the act of the defendants in refusing bail being proved to be a wrongful act in law. Under these circumstances his lordship told the jury that he thought malice should be proved in order to sustain the action, but at the same time left it to them, and they found for the defendants.

Albert Prince moved for a new trial, for misdirection,

and on the law and evidence. He cited 3 Edw. I. ch. 15; Hale's Pleas of the Crown, 97; 2 Hawk. P. C. Ch. 15, sec. 30; Edwards v. Ferris 7 C. & P. 542.

Cur. adv. vult.

BURNS, J., delivered the judgment of the court.

There is no ground upon which to grant a rule. The opinion expressed at the trial is quite in accordance with what is now understood to be the law, whatever the older authorities may have held as to the peremptory right in cases of misdemeanors that the party charged should be admitted to bail. Mr. Chitty, in his work on criminal law, vol. i., p. 73, says that "in the practice of the best regulated police offices there are many instances of prisoners being detained much more than twenty days between their first being brought before a justice and their commitment for trial, and being brought up for examination several different days during the interval." No distinction is here drawn between cases of misdemeanor and of felony. The question whether in refusing bail in cases of misdemeanor the justices were acting in a judicial or ministerial capacity was decided after a careful consideration of all the previous cases and the law upon the subject, in the case of Linford v. Fitzroy (13 Jur. 303, 18 L. J. M. C. 108). It was an action brought against a justice for refusing to take bail, and in rendering the verdict the jury negatived any malice in the defendant. In giving the judgment of the court, Lord Denman says the allegation of malice is to be treated as struck out of the declaration; and then the question was, whether an action would lie against a justice of the peace for refusing to take bail. The question then was, when the justice's judicial duty was satisfied, and at an end, and when his ministerial duty only remained to be executed. In this case the judicial duty clearly was not at an end, because no examination of the case had as yet been made. Lord Denman says: "We have had much doubt and difficulty in coming to a conclusion upon this point; but, upon the fullest consideration, we are of opinion that the duty of the magistrate in respect of admitting to bail cannot be thus split and divided; that it is essentially a judicial duty, involving in-

quiries in which discretion must be exercised, and, in some cases of misdemeanor, discretion under circumstances of much nicety; and that we cannot lay down a rule which is to depend upon the peculiar facts of each case. The broad line of distinction is this, that unless the duty of the magistrate is simply and purely ministerial, he cannot be made liable to an action for a mistake in doing or omitting to do anything in execution of that duty, unless he can be fixed with malice." The question raised in this case is now however, provided for by the 13th section of statute 16 Vic. ch. 179—"An act to facilitate the performance of the duties of Justices of the Peace out of sessions, with respect to persons charged with indictable offences."

There should be no rule in this case.

Rule refused.

O'DONNELL V. HUGILL ET AL.

Word "plaintiff" used for "defendant"—Plea of substituted agreement—Uncertainty in agreement.

A mistake in inserting the word *plaintiff* instead of *defendant* is not fatal, even on special demurrer, when it is quite clear that the latter was intended, but the court may read the plea as if the right word had been used.

It is not necessary that any consideration should be stated for the acceptance of a substituted agreement, for the consideration of the first contract is regarded as continuing and applicable to the second.

An agreement that A shall saw certain logs and deliver the lumber at his mill to B, as soon as he is able to do so, such sawing to be paid for immediately on delivery, is not void for uncertainty.

ASSUMPSIT on a special agreement. The plaintiff declared that in consideration that he would deliver to the defendants at their saw-mill in West Flamboro' two hundred saw-logs to be sawn, and would pay the defendants at the rate of 15s. per 1000 feet for such sawing, to be paid when the said lumber was sawn, the defendants promised to saw and deliver the said lumber at their said mill by the 1st of May, 1852: that the plaintiff, confiding in such promise, delivered the logs to the defendants at their mill, who accepted the same: that the plaintiff had always been ready and willing to pay for such sawing, and did, on the 2nd of January, 1852, advance to the defendants £27 2s. 3d. on account thereof, yet the defendants did not nor would saw the said logs and deliver the said lumber according to the agreement; but on the contrary thereof converted and

appropriated the same to their own use, whereby the plaintiff hath lost the value thereof, &c.

Sixth Plea—That after making the said agreement, and before any breach thereof, it was, at the request of the plaintiff, agreed by and between the plaintiff and defendants, that the *plaintiff* should saw the said logs and deliver the said lumber at their mill to the plaintiff, whenever the defendants should be able to do so; such sawing to be paid for immediately on such delivery, which agreement the plaintiffs accepted in full satisfaction and discharge of the promise declared upon, before any breach of such promise; and the plaintiff thereby and then wholly released and discharged the defendants from the further performance of such promise and undertaking; and that the payment in the first count mentioned was made on account of such substituted contract.

The defendants demurred to this plea, assigning for causes:—that the making of the said agreement therein alleged is not alleged to have been before the commencement of this suit:—that the plea is absurd and contradictory, in alleging that it was at the request of the plaintiff agreed by and between the plaintiff and defendants that the *plaintiff* should saw the said logs and deliver the lumber whenever the defendants should be able to saw and deliver the same, thereby leaving it uncertain whether the plaintiff was to saw the logs at defendants' mill, or whether the plaintiff was or defendants were to deliver the same, or whether the defendants were to saw and deliver the lumber.

Freeman, for the demurrer, cited *McLeod v. Eberts et al.*, 7 U. C. R. 251.

A. Crooks, contra, cited *Aspdin v. Austin*, 5 Q. B. 673; *Moore v. G. W. R. R. Co.*, 10 U. C. R. 243; *Slade v. Hawley*, 13 M. & W. 757.

ROBINSON, C. J., delivered the judgment of the court.

We do not think that there is any defect in this declaration that we can hold to be fatal on general demurrer. Then, as to the plea, it follows closely the precedent given of a plea of a substituted agreement in *Mr. Chitty's work*

on pleading, vol iii., page 63, and which plea was held sufficient on demurrer. When I say that it follows it closely, I must make an exception of the slip which has been excepted to, and which probably gave rise to the demurrer, in using the word "plaintiff" in one place, where *defendant* was evidently meant to be inserted, but it is so obvious that "defendant" must have been intended that we think we may fairly, upon the authority of *Coles v. Hulme* (8 B. & C. 568) read the plea as if the word "defendant" stood there (a).

It is seldom worth a party's while to demur on account of a manifest mistake of this description, for the court would in general allow the party to amend without paying costs. There is another inaccuracy in this plea, in not sufficiently distinguishing all the way through between the first and second agreements, when speaking of them, but that is not specially assigned as a cause of demurrer; and there again also the inaccuracy is clear from the context.

As to the objection that there is no consideration stated for accepting the substituted agreement, this plea follows in that respect the usual form. The original consideration is regarded as continuing and applicable to the last agreement; in other words, the party enters into an agreement, with its modification, upon the same inducement which actuated him in the first instance; the one agreement, though modified in some particulars, is still the consideration of the other. It may be assumed that it was for mutual convenience that an agreement is substituted, as might well be the case in the present instance; because, although the period of performance by the defendant is, or at least might be, postponed by the new agreement, on the other hand he might well be willing to assent to that, as it would at the same time postpone to the same extent the time when he would have to make his payments. One can easily understand that the change might be of advantage to both.

(a) See also Ch. Pl. 7th Ed. vol. i. 273, *note h.*, referring to an M.S. case of *Atkins v. Warrington*, where the declaration stated that the defendant on the 1st November, A.D. *one thousand eight* (omitting *hundred*) and *twenty-six*, was indebted, &c., and afterwards stated "on the day and year aforesaid" and the omission was held to be no ground of demurrer.

There is no doubt an appearance of being indefinite in the new agreement as regards the time when the logs should be sawed, but we think it cannot be held to be so utterly uncertain as to be void, for it resembles in that respect contracts which are often made and carried into effect. It would be incumbent on the plaintiff, in suing upon the substituted agreement, to shew that the defendants had neglected unreasonably, under the circumstances, to saw and deliver the timber.

Judgment for defendants on demurrer.

FLINT V. BIRD AND CORBY.

In an action of trespass for taking timber, the court refused to disturb the verdict of the jury, on the ground that the damages were beyond the value of the logs taken.

TRESPASS *qu. cl. fr.*, and for taking timber.

Second count—for cutting down trees, and converting them, &c.

Pleas—1st. Not guilty. 2nd. Denying that the closes were the plaintiff's. 3rd. Denying that the trees were the plaintiff's.

At the trial at Belleville, before *Burns, J.*, a verdict was rendered for the plaintiff against defendant Bird for £319 1s. 0d., and a verdict for the defendant Corby.

Wallbridge moved to set aside the verdict for the plaintiff, and for a new trial on the law and evidence, and for excessive damages.

Cur. adv. vult.

ROBINSON, C. J., delivered the judgment of the court.

The evidence in the judge's notes seems fully to warrant a verdict for the damages given, and against both the defendants, though the jury found against Bird alone. The defendant called no witnesses.

We should not grant relief on the affidavits as to the value of the logs. The defendant should have given evidence as to the value, if he did not acquiesce in the valuation made by the plaintiff's witnesses.

About 3000 saw logs were cut, sworn to be picked logs worth four shillings each when drawn out, and which would cost about two shillings and sixpence each to get out.

The plaintiff had to pay £56, and apparently more, to surveyors and others, to run the lines, and count the logs, so as to enable him to establish the trespass. The defendant and his men were violent and threatening; and great trouble and some risk attends the obtaining justice for these high-handed depredations.

We should not go into nice calculations of the value of timber thus plundered, in order to confine the jury to that simply as the measure of damages. It will be salutary to teach the defendants and others that they must respect private rights, and are not to assume that they may strip large tracts of land that they have no claim upon of their timber, and that they will be protected against paying more than they would have had to pay if they had bought the logs honestly from the lawful owner.

Rule refused (a).

WARD V. MURPHY ET AL.

Practice—New trial as to one of several defendants in trespass.

Where in an action for trespass the verdict is in favor of some of the defendants and against the others, a new trial will not be granted as to the latter, but the application must be for a new trial against all, and the consent of those acquitted must be obtained, or the rule *nisi* served upon them.

TRESPASS, *qu. cl. fr.*, prostrating fences, and cutting down and converting trees and underwood.

The defendants pleaded jointly several pleas.

The jury found a verdict against the defendant Murphy for £20 damages, and for the defendant Wheeler.

McMichael moved for a new trial on behalf of Murphy, on the law and evidence.

Cur. adv. vult.

(a) In a very late case, of *Creed v. Fisher*, reported in the *Law Times* of Feb. 25, the Court of Exchequer ruled that they would not disturb the verdict of the jury on the ground of excessive damages, unless it be very manifest that they were actuated by some improper motive, or had adopted some wrong principle. This was an action for assault.

ROBINSON, C. J., delivered the judgment of the court.

The first question in this case is, can we grant a new trial as to one defendant, leaving the verdict to stand as to the other. We did so in *Davis v. Moore et al.* (2 U. C. R. 180) conceiving that the reason and justice of the thing called for it, when the verdict was manifestly right as to the defendant acquitted, but as clearly wrong as to the other; and that we were warranted by the very strong opinion expressed on the point in *Green v. Elgie et al.* (5 Q. B. 107).

It is not easy to ascertain what the settled practice is upon this point in England; but on looking at all the cases (a) we think a new trial would not be granted in England as to one or more defendants convicted of a trespass where others were acquitted, but the application must be for *a new trial generally*—that is, as to all the defendants; and that the court will not grant it unless those acquitted consent, or unless the rule nisi has been served on them as well as on the plaintiff. Murphy's counsel in this case may so shape his motion, and follow the practice as I have just stated it, but he intimates he does not desire a rule nisi, unless the court has a strong impression that a new trial as to Murphy should be granted—that is, upon the merits of the application; and we do not think, on looking at the evidence, that we can encourage the expectation that we should make such a rule absolute.

The Lord Chief Justice then remarked on the facts of the case, which are not material to be reported. No rule was taken.

ARNOLD V. HIGGINS.

Semble, That the statute law of a foreign country may be proved by the oral evidence of a lawyer from thence.

This was an action of replevin. The facts will be found fully stated in the report of the case, when a new trial was granted, ante page 191.

The witness on account of whose absence chiefly the first

(a) See *Price v. Harris et al.*, 10 Bing. 331; *Sir Ch. Berrington's case*, 3 Salk. 362; *Cooper v. South*, 4 Taunt. 802; *Parker et al. v. Godin*, 2 Str. 814; *Bond v. Spark et al.*, 12 Mod. 275; *Belcher v. Magnay et al.*, 3 D. & L. 70; *Doe dem Dudgeon v. Martin et al.*, 13 M. & W. 811; *S. C.* 2 D. & L. 678.

verdict was relieved against was examined upon the second trial, and the jury again found for the plaintiff.

The defendant's counsel objected that there was illegal evidence received of what was spoken of as being the statute law of the State of New York, in respect to the control which a wife is allowed to exercise there over property which she has acquired before or during coverture.

Hallinan obtained a rule nisi for a new trial ; to which *Dempsey* shewed cause.

The court discharged the rule, on the ground that the evidence was sufficient to warrant the finding of the jury, and the judgment on this part of the case is not material to report. As to the evidence objected to, *Robinson, C. J.*, said, " The reception of oral evidence from a lawyer of that country as to their written law, is not contrary to, but in accordance with the law as it has been settled in England by recent decisions, though I confess those decisions seem to me to amount to nothing less than a change of the law."

Rule discharged (a).

REGINA V. CRABBE.

Habeas Corpus—Certiorari—Constitution of Quarter Sessions. 7 W. IV., ch. 4, sec. 2—8 Vic. ch. 13, sec. 3.

A *habeas corpus* will not be granted to bring up a prisoner under sentence of conviction at the Quarter Sessions for larceny; nor a *certiorari* to remove such conviction, for there can be no *certiorari* after judgment. It is no objection that neither the Judge of the District Court nor any barrister was present when the conviction was made.

Vankoughnet, Q. C., moved for a *habeas corpus* to the sheriff of the united counties of Huron and Bruce to bring up the body of the defendant, who was under sentence of imprisonment for an alleged felony, and upon an alleged conviction of the last Court of Quarter Sessions ; and for a *certiorari* to remove the record of conviction of Crabbe by Quarter Sessions.

It was shewn that after verdict of guilty on an indictment against the defendant for larceny, the prisoner's counsel moved to arrest the judgment on several grounds, mostly untenable, but among them that the court on the trial was constituted without a barrister (as required by 7

(a) See Tay. Ev. Sec. 1042, and the cases there referred to.

Wm. IV., ch. 4) of five years' standing, or any barrister whatever,—the judge of the County Court, who is *ex-officio* chairman of the Quarter Sessions, being absent.

It was sworn that Mr. Ackland had been for years, and was, as deponent believed, at the time of the trial judge of the County Court of the said county; that he was present in Goderich at the time of the trial, not prevented by illness from attending, nor was any reason assigned for his not attending, except that he stated that he had received a letter from the Attorney General stating that on his telegraphing to the government his resignation of his judicial office he would receive an appointment as registrar; and that he would therefore act no longer as judge; that the deponent believed and understood from him that he had resigned his judicial office, or signified his resignation, or intended resignation, at the time of the trial.

Cur. adv. vult.

ROBINSON, C. J. delivered the judgment of the court.

We cannot properly grant the *habeas corpus* to bring up a prisoner who is under sentence upon a conviction for larceny at the Quarter Sessions; and if we should grant the writ, the sheriff or gaoler would do right to return that the prisoner is in his custody in execution of a sentence upon conviction before the Quarter Sessions, and not bring up the prisoner. If there has been anything wrong in the proceedings below, still there can be no *certiorari* after judgment; the only course is by writ of error.

We can see nothing wrong, however. We cannot go into the evidence, even if the case were before us on a writ of error. The indictment is right in form: it charges the whisky stolen to be *of the value of £6*. That does not, under 7 Wm. IV., ch. 4, sec. 2, make it necessary that there shall be a barrister of five years' standing presiding in the court, supposing that statute to be in force.

Then, as to statute 8 Vic. ch. 13, sec. 3; that provides that except in case of absence from sickness, or *other unavoidable cause*, the judge of the District Court shall preside. The regularity of the constitution of a court can never depend

upon a question to be tried by us on affidavit, whether an absence was *unavoidable* or not. It must be looked on as a direction that the judge is to preside when he can.

Writ refused (a).

JAMES V. ELLIS.

Trespass for false imprisonment—Justification—Evidence of writ set aside.

In trespass for false imprisonment the defendant justified under a writ of *capias* from a county court. The plaintiff replied that by an order of the judge of the county court the writ of *capias* in the plea mentioned was set aside, and the plaintiff discharged from custody, on account of the insufficiency of the affidavit to hold to bail. The defendant rejoined, denying that the writ was so ordered to be set aside, or that it was void and of no effect and on this issue was joined. It appeared that the judge's order was that *the defendant should be discharged from custody, and the arrest set aside*, on account of the insufficiency of the affidavit.

Held, that on the issue raised the plaintiff must fail, for the arrest might be set aside and the writ still remain in force.

Quære, whether an action of trespass is maintainable when the arrest only is set aside, and the writ left untouched.

TRESPASS for arrest and false imprisonment.

The defendant justified under a Ca. Re. from the county court of York, Ontario, and Peel, in which he was plaintiff against this defendant.

The plaintiff replied, that before the commencement of this suit the judge of the county court, after hearing both parties, ordered "that the said writ in the plea mentioned should be set aside, and that this plaintiff should be discharged from custody, by reason of the insufficiency of the affidavit to hold to bail upon which the said writ issued, and that the said arrest was thereby set aside upon the ground aforesaid; that the order has remained in full force; and that, *by reason of the premises, the said writ in the plea mentioned was and is void and of no effect.*"

The defendant rejoined, "that by the order made on the day mentioned in the replication by the judge of the county court, it was not ordered that the said writ should be set aside by reason of the insufficiency of the affidavit to hold to bail upon which the said writ issued, as in the replication

(a) See Ch. Crim. L. vol. i. 381, 747, 749; Rex. v. The Inhabitants of Seton, 7 T. R. 373.

mentioned, and the said writ by reason of the premises mentioned in the replication was not, and is not void and of no effect, in manner and form, &c., concluding to the country."

The plaintiff joined issue.

At the trial at Toronto, before *Richards, J.*, the order made by the judge was produced, and was an order "*that the defendant be discharged from custody in the cause, and the arrest set aside* without costs, on the ground of the insufficiency of the affidavit to hold to bail."

The defendant thereupon insisted that he was entitled to succeed upon the issue joined, upon the ground that the judge's order did not set aside the writ of *capias*, but only the arrest, and the issue was whether *the writ* was void.

The learned judge thought so, but desired the jury to find such damages as they might think it right to award to the plaintiff, if he should prove himself entitled to recover and he reserved for the opinion of the court whether the defendant was not entitled to have a verdict entered for him on the second plea.

McIntyre obtained a rule to enter a verdict for the defendant on the leave reserved, or for a new trial on the law and evidence, and for misdirection, and for excessive damages. He cited *Reddell v. Pakeman*, 3 Dowl. 714; S. C. 2 Cr. M. & R. 30; 8 Vic. ch. 13, sec. 14, 8 Vic. ch. 48, sec. 44.

Dempsey shewed cause, and cited *Parsons v. Lloyd*, 3 Wils. 341; 1 Arch. Prac. 567; *Green v. Elgie*, 14 L. J. Q. B. 162; S. C. 5 Q. B. 99; *Ley v. Loudon et al.*, 10 U. C. R. 380.

BURNS, J., delivered the judgment of the Court.

The plaintiff, we think, fails to establish the issue he has raised. By the order of the judge of the county court the execution of the writ of *capias* alone is set aside, the writ itself being still left in force. It is quite clear that in many cases the execution of the writ may be set aside, and yet the writ be available; for instance, if a person were improperly arrested upon a writ while he was attending a court when he would be privileged; yet he might be afterwards arrested upon the same writ while it was still current. Whether an action of trespass can be maintained upon the setting aside of an arrest merely, leaving the writ in force, is not neces-

sary to be determined in this case. It was argued on the authority of *Reddell v. Pakeman* (2 Cr. M. & R. 30), that such action could not be maintained so long as the writ remained in force. If this be so it would seem to follow that it is competent in all cases where the application to discharge from arrest is founded upon a defect in the affidavit to hold to bail, for the court or a judge to leave the writ untouched in setting aside the arrest, and thus prevent any action of trespass being brought. The present case, however, does not present that question, for the issue which the plaintiff has taken is, whether the writ was or not set aside. If the writ had been set aside for the cause alleged in the replication, the plaintiff must then have recovered. It is not equivalent to the setting aside of the writ to say that the arrest was set aside for an insufficient affidavit to hold to bail. The plaintiff has chosen to rest his case upon the fact whether the writ was or not set aside; and as a writ may be still a good writ though the execution of it be set aside, the precise question which the plaintiff seeks to raise ought to have distinctly appeared upon the record, and then the court could judge whether this case came within that of *Reddell v. Pakeman*. It is a material issue whether the writ was regular and remained in force, and upon that issue the defendant should succeed.

The rule for entering a verdict for defendant should therefore be made absolute.

ROBINSON, C. J.—I agree in the judgment just given by Mr. Justice Burns. The setting aside the writ and the writ being void were clearly of the substance of the issue on the second plea, for the defendant would not be a trespasser without shewing the writ set aside as void on the face of it, or void by reason of its being unauthorized by law. How it might be, if it appeared on the pleadings that the arrest was made upon a cause of action which there could be no right to arrest upon on *any form* of affidavit, this action being against the plaintiff who sued it out, is not necessary to be determined, for nothing of that kind appears on the record, and the contrary was shewn in evidence.

DRAPER, J., concurred.

Rule absolute.

STEPHENSON V. GREEN.

Bankrupt and Insolvent Debtors' Acts—7 Vic. ch. 10, sec. 15, 8 Vic. ch. 48, secs. 1, 5, 24, 29.

Quere, whether a person having failed before the passing of the Bankrupt Act (7 Vic. ch. 10), but remaining a trader and unable to meet his engagements, could, after the bankrupt law had come into force, take advantage of the Insolvent Debtors' Act.

Semble, per *Robinson, C. J.*, that under the 5th section he could: *Semble*, per *Draper, J.*, that he could not.

Where an order for protection as an insolvent debtor is pleaded in bar of a debt, it must be averred that such debt was included in the defendant's schedule.

Although it may appear that an order so pleaded was improperly granted, being unauthorized by the statute, and might therefore have been successfully resisted—or, perhaps, afterwards cancelled by the tribunal that granted it—yet this court will not discuss its validity when set up by the debtor as a defence to an action against him.

The plaintiff sued on a promissory note for £48 16s. 4½d., made by the defendant on the 17th of October, 1846, under the firm and style of M. L. Green & Co., payable to the plaintiff at the city of Rochester, in the state of New York, five months after date; and also (in a second count) upon another promissory note for the like sum of money, made by the defendant under the firm and style of M. L. Green & Co. on the same day, payable to the plaintiff at the Rochester City Bank in the city of Rochester, in seven months from the date.

The defendant pleaded to both these counts, that after the notes became due, and before this suit, viz., on the 29th of May, 1848, the defendant, having resided twelve calendar months within the United Counties of Frontenac, Lennox, and Addington, duly presented to the judge of the County Court of those united counties his petition for protection from process, according to the statute passed in the eighth year of her present Majesty's reign (the Insolvent Debtors' Act, 8 Vic. ch. 48); and that afterwards, on the 29th of May, 1848, a final order for the protection of the defendant from process, and the distribution of his estate, was made according to the statute by the said judge, &c., which order remains in full force.

The plaintiff replied to this plea, that the defendant in his petition alleged that he was a trader, and failed before the passing of the statute relating to bankrupts; and the plaintiff averred that the defendant was such a trader as came within

the meaning of the bankrupt law in force at the time of the passing of the statute mentioned in the plea (the Insolvent Debtors' Act, 8 Vic. ch. 48); and that, although the plaintiff had failed in such business before the Bankrupt Act was passed, yet that after the passing of that act, and while it was in force, and before the defendant presented his petition, he was engaged in the business of a trader, to wit, that of a merchant, within the meaning of the said Bankrupt Act; and that the promises and causes of action in the first and second counts mentioned were made and accrued since the passing of the said statute, viz., on the days in the declaration mentioned, and that while the defendant was such trader, and the said statute was in force, the petition of the defendant was presented.

The defendant demurred to this replication, insisting that it was no sufficient answer to the plea, and tendered an immaterial issue, because the debts were contracted before the filing of the defendant's petition, and it is not denied that the petition was duly presented, or the order for protection duly made, which order must under the statute operate as a bar to the plaintiff's action.

Vankoughnet, Q.C., for the demurrer.

Richards, contra, cited *Cook v. Henson*, 1. C. B. 908; *Jacobs v. Hyde*, 2 Ex. 508; *Platel v. Bevill*, Ib. 512; *Turner v. Pulman*, Ib. 514; *Laurie v. Bendall*, 12 Q. B. 634.

ROBINSON, C. J.—The defendant is entitled, I think, to succeed upon this demurrer. He has obtained his final order under the statute 8 Vic. ch. 48, upon his petition as an insolvent debtor, and he has pleaded all that the statute says (in the 24th clause) it shall be necessary to plead in order to make that final order a bar to the action. The plaintiff by his replication endeavours to shew that, notwithstanding this, the defendant is not protected under the statute—not on account of any fraud in obtaining the final order for protection, nor on account of anything peculiar respecting the plaintiff's debt, which should prevent the order applying, but on account of something which under the provisions of the

act is not at all inconsistent with the protection pleaded, and cannot, as I conceive, entitle us to treat it as a nullity.

There is, however, an apparent objection to the application of the Insolvent Act to such a case as this is stated to be in the plaintiff's replication, and it seems by no means unreasonable that the plaintiff should have placed the construction which he has done upon the intention and effect of the statute. Our bankrupt and insolvent laws were framed under peculiar circumstances, which have occasioned a few peculiar provisions not to be found in the English acts, upon which they are, generally speaking, framed. These peculiarities give rise to questions which have not arisen in England, of which this case affords an instance. We had no bankrupt laws till 1843; and our first statute (7 Vic. ch. 10) made nothing an act of bankruptcy which had taken place before its passing: a man could only be made a bankrupt by reason of something done or suffered after the statute. Then, two years afterward, our Insolvent Debtors' Act was passed 8 Vic. ch. 48; and the legislature, it is plain, intended by it to give relief to two classes of persons: 1st, those who could not for some reason be brought within the operation of the Bankrupt Act; and, 2ndly, those whose debts were so considerable as to make it desirable that their estates should be subjected to a less inconvenient and expensive management than the estates of bankrupts under the former statute.

In defining who might avail themselves of the Insolvent Act, the legislature, in the first clause of the statute, enumerates, 1stly. Persons not being traders within the meaning of the Bankrupt Act. 2ndly. Persons not having been traders before the passing of the Bankrupt Act (an exception for which I cannot say I perceive the reason, but it does not concern this case). 3rdly. Persons having been traders before the passing of the Bankrupt Act, but excluded from the operation thereof. 4thly. Persons being such traders, but owing debts amounting in the whole to less than £100.

The plaintiff tells us in his replication that this defendant petitioned upon the ground that, though he had been a trader within the meaning of the bankrupt laws, yet he had failed before the passing of that statute; and the plaintiff admits

that these were the facts of the defendant's case ; but he insists that those facts did not bring him within the Insolvent Debtors' Act, unless they excluded him from the operation of the bankrupt law, and he contends, very reasonably, that they did not exclude him—that is, that they did not necessarily exclude him—because, though he had failed before the passing of the Bankrupt Act, and though any act of bankruptcy that took place before the passing of the Bankrupt Act, and though any act of bankruptcy that took place before the act could not be made use of for rendering him legally a bankrupt, yet the plaintiff alleges that the defendant was not in consequence excluded from the operation of the bankrupt law, because, continuing a trader after the act, and being unable to meet his engagements, he could easily have made himself a bankrupt under the 15th clause of the act, by voluntarily declaring himself unable to meet his engagements. This is certainly true ; but still the 5th clause of the Insolvent Debtors' Act and the forms of the petition and of the final order given in that statute, seem to me to show that the legislature have in express terms allowed all traders to petition for protection under this act, who, having been traders, had failed before the passing of the act.

The statute enables such persons to take advantage of the Insolvent Act in express terms. It authorizes the proper tribunal to make a final order of protection in their favor, and it provides that such order shall be a bar to the recovery of debts contracted before the filing the petition. We cannot overrule the statute, by holding that it ought not to have contained such provisions, or that it should have qualified them by some modifications, which it may seem to us it would have been reasonable to have inserted. There is ample provision in the act for notice to creditors before the final order can be made, and in the 26th clause it is provided how and for what causes the protection shall be removed by the tribunal which granted it.

We cannot, in the face of the words of the statute, which admit such a case as the petitioner's, declare his protection void after he has surrendered his property, and after it has, for all we know, been distributed among his creditors, who obtain by means of this statute the same advantage which

they could have had under the Bankrupt Act, and upon the terms common to both acts, of the debtor being discharged from actions on account of their claims.

I may be wrong, and probably am, in this view of the statutes and of their legal effect, for my brothers think differently, I believe; and it seems the Insolvent Debtors' Act has been usually in practice considered not to be available to those who were traders after the passing of the bankrupt law, and who by reason of anything done by them or within their power to do, might have been brought, or might have brought themselves within the provisions of that statute. Still, although upon that view of the statute the final order may have improperly granted to this defendant, and might have been successfully resisted, and possibly might have been cancelled afterwards by the tribunal which granted it, I do not consider that it therefore follows that while it continues in force it can be indirectly attacked and treated as a nullity, when set up as a defence in an action against the insolvent debtor. In *Cook v. Henson* (1 C. B. 908) that point was expressly determined in accordance with what I have expressed; and there is another point in which we all agree, and which is so entirely of substance and lying at the very foundation of the defence pleaded in this plea, that we are not at liberty to overlook it, and that is, that by the 29th clause of our statute 8 Vic. ch. 48, as by the acts now in force in England, the final order is only made a protection against the suits of creditors who are named in the schedule, or of the holders of negotiable securities mentioned in the schedule. This certainly seems inconsistent with the 24th clause. If the two clauses were clearly irreconcilable, the 29th clause must prevail, as being the last declaration of the intention of the legislature, and therefore fairly to be taken as a qualification or correction of the former; but they may be reconciled by looking upon the 24th clause as only meant to lay down what particulars should be pleaded in order to make the final order a bar in those cases in which the act gives it that effect. The 29th clause, it is true, provides that the final order shall protect the *person* of the petitioner in respect to those debts (only) which are enumerated in his schedule. Nothing is said which does in terms so limit its effect as regards its barring

the action generally, but the court took no distinction of that kind in the case of *Phillips v. Pickford* (14 Jur. 272), and determined that, under enactments precisely like those in our statute, the final order could not be set up as a defence to any debt not included in the schedule ; and they held that the plea must shew that the debt sought to be barred by it was such a debt ; and it would seem absurd indeed, that as to any debt not included the *person* should not be protected, while the claim itself might be barred.

I think on this ground—that the debt is not averred to be included in the schedule—we must hold the plea bad, and so give judgment for the plaintiff.

DRAPER, J.—The plea follows the 24th section, and might therefore be deemed to disclose an absolute bar without stating more, but the case of *Phillips v. Pickford* (14 Jur. 272) decided, on the two English statutes 5 & 6 Vic. chap. 116, and 7 & 8 Vic. chap. 96, that the plea should also shew that the debt was named in the schedule. Our statute is a compound of the provisions of those two acts, and one ground of that decision therefore becomes inapplicable ; namely, that the provisions of the former act are partially repealed by those of the latter. It may, however, be found that, inasmuch as our act contains the apparently inconsistent provisions of the two Imperial statutes, a similar construction should be adopted in respect to the sufficiency of a plea framed like the first in this action, and that the latter clause in the same act must in like manner control the former ; and in deciding the present case I am influenced by that opinion, for though no such objection was raised to this plea, yet if it be not by force of the statute a bar to this action in its present form, it strengthens the argument that the plaintiff may shew in the replication other facts which prevents its having that effect : and when, in the absence of any averment that the debts now sued for were named in the defendants schedule, it is averred by the replication that this debt occurred when the bankrupt law was in force, and when the defendant was a trader within its meaning, and that the ground on which the defendant petitioned for and obtained the final order was, that he was a trader within

the meaning of the Bankrupt Act, but failed *before* it came into force, I think the replication cannot be said to tender an immaterial issue, for the becoming a trader *after* the passing of the Bankrupt Act must surely exclude the defendant from the benefit of the fifth section of the Insolvent Act: and I do not think that after the defendant petitioned for and obtained the final order on that ground, he can object to the replication for not shewing that he did not come within another class of persons named in the act—namely, traders within the meaning of the Bankrupt Act, but owing debts less than £100.

I have looked at *Jacobs v. Hyde*, 2 Ex. 598; *Platel v. Bevill*, Ib. 511; and *Laurie v. Bendall*, 12 Q. B. 634, cited in argument; but, though important as to the construction of the Imperial statutes, they do not touch the point in question in this case.

BURNS, J., concurred.

Judgment for plaintiff on demurrer.

HILARY TERM, 1854.

Present—The Hon. JOHN BEVERLEY ROBINSON, C.J.

“ “ WILLIAM HENRY DRAPER, J.

“ “ ROBERT EASTON BURNS, J.

IN RE HIRONS ET AL. AND THE MUNICIPAL COUNCIL OF AMHERSTBURG.

Entitling of affidavit.

An affidavit in support of an application to quash a by-law was not entitled in any court, and there was nothing to shew that it was sworn before an officer of any court, the commissioner styling himself merely “A commissioner, &c.” *Held*, insufficient.

In this case *Hector* had obtained a rule nisi to quash a by-law.

Richards, in shewing cause objected that the affidavit on

which the rule was moved was not entitled in the Queen's Bench, or in any court, but merely "United Counties of Essex and Lambton, to wit"—in the *Jurat* it was stated to have been sworn at Amherstburgh, before William McMullen, *A Commissioner, &c.*

Wilson, Q. C., cited *Fraser v. The Municipal Council of Stormont, &c.* 10 U. C. R. 286, as in point against this objection.

ROBINSON, C. J., delivered the judgment of the court.

We feel that the preliminary objection taken in this case, that the affidavit on which the application is founded is not entitled in any court, is too strong to be got over. In the case cited, of *Fraser v. The Municipal Council of Stormont, &c.*, it did appear by the *Jurat* that the affidavit had been sworn before a commissioner of this court; and under the circumstances of that case, the affidavit which was objected to did not appear to the court to be indispensable for supporting the application.

In this case the affidavit on which the rule nisi was obtained is neither entitled in this court, nor stated to have been sworn before an officer of this court. If the commissioner had had time to add something more definite than an &c. to his name, and if the affidavit had shewn upon the face of it that it was sworn before a commissioner of this court, then the cases of *Perse v. Browning* (1 M & W. 361) and *White v. Irving* (5 Dowl. 289) would have warranted us in holding that the applicant was at liberty at any time before moving for his rule to entitle it in to this court, and it might then have been held sufficient, though it was not so entitled at the time it was sworn. But here there was not only no entitling in this court at the time of the affidavit being sworn, but it was not so entitled when it was used, and is not now so entitled, though a rule has issued upon it; and what is even more fatal is, that there is nothing to shew us that the affidavit was in fact sworn before any person having authority to administer an oath in this court, or in any court.

The cases of *Osborn v. Tatum* (1 B. & P. 271), *The King v. Hare* (13 East 189), and of *Molling v. Poland* (3 M. & S.

158,) shew that the affidavit is insufficient. On account of this defect, the rule must be discharged, but not with costs.

Rule discharged (a).

McINTYRE v. THE MUNICIPAL COUNCIL OF BOSANQUET.

By-law to establish a road quashed for uncertainty.

A by-law to establish a road was in these terms:—

“Be it enacted, &c., that the new survey made by Mr. A. M. Holmes, commencing at the Pine Hill road on lot 37, Lake Road East, running south-westerly, south of the old lake road, until it strikes the old lake road on lot 52, be, and it is hereby established and constituted a public road. And be it further enacted, that the said road shall be four rods in width.”

Held, that the road to be established was not sufficiently defined, and that the by-law must be quashed for uncertainty.

Becher moved to quash a by-law, passed on the 30th of August, 1852, “for establishing a line of road to be known as the new Lake Road, as surveyed by Mr. A. M. Holmes, D. P. S.,” with costs, on the ground that it was uncertain, and that the road intended to be thereby established was not sufficiently described.

The by-law ran thus, “Be it enacted, &c., that the new survey made by Mr. A. M. Holmes, commencing at the Pine Hill road on lot 37, lake road east, running south-westerly, south of the old lake road, until it strikes the old lake road on lot 52, be, and it is hereby established and constituted a public road. And be it further enacted, that the said road shall be four rods in width.”

Crickmore shewed cause.

Wilson supported the rule.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the cases decided in this court of

(a) At the conclusion of this judgment *Hagarty*, Q.C., remarked that since the act for equalizing the business of the courts, great inconvenience had been found in entitling affidavits to hold to bail; for in some cases, after being sent to the country and returned sworn to, no writ can be taken out for several days in the court in which the affidavit is entitled. *Draper*, J., said that the case of *Perse v. Browning*, referred to in the judgment, would shew that it is not necessary to entitle in any court before the affidavit is sworn. If the commissioner shews himself to be an officer of both courts, the affidavit may be afterwards entitled, and the writ sued out in either court.

Smith v. the Municipal Council of Euphemia, (8 U. C. R. 222), Dennis v. Hughes et al. (Ibid. 444), and Brown v. The Municipal Council of the County of York (Ibid. 596), must be taken by us to determine this case ; and that we must quash this by-law, upon the exception taken, that it does not sufficiently define the road to be established by it.

The case of Davison v. Gill (1 East 72) is a strong authority in support of the decisions we have hitherto made on this point.

In this case there is no reference to any plan as annexed, or even as having been made. This by-law only speaks of "a survey made by Mr. Holmes," without even stating that he had placed in possession of the council any report or description of such survey, and omitting all information of where any such sketch or description can be found, and giving no description of the road further than that it is to be four rods wide, and was surveyed by Mr. Holmes ; by which nothing more may be meant than that he had laid out a road four rods wide somewhere upon the ground.

Rule absolute, with costs.

REGINA EX REL. TAYLOR V. CÆSAR.

Election—Qualification of voters—Residence—Estoppel.

A. had his dwelling house at Bowmanville, where his wife and family resided, but he had a saw-mill and store, and was postmaster in the township of Cartwright, which occasioned him frequently to visit that place, and while there he used to board with one of his men in a house owned by himself. *After voting at Bowmanville he went down to Cartwright and voted there also at the election for township councillor which was being held at the same time.* It appeared that the relator, one of the candidates for Cartwright, objected to A.'s vote there, but said it should be accepted if he would swear that he was a resident, and that A. took such oath, and his vote was thereupon recorded.

Held (reversing the decision of the judge of the County Court) that A.'s vote should have been rejected, for he was a resident of Bowmanville, and entitled to vote there only, and his conduct in voting there first shewed that he regarded that as his home.

Held also, that the relator's conduct could not estop him from afterwards objecting to the vote.

Richards moved to reverse a judgment given by the learned Judge of the County Court of Northumberland and Durham in this case, upon a summons under the statute, in the nature of a *quo warranto*, to try the right of the defendant to be

returned at the last election as a township councillor for ward number three in the township of Cartwright, and also to try the right of the relator to be returned as chosen in his stead.

The decision of the learned judge was, that the defendant was duly elected. He found two of the votes to be good which had been objected to by the relator as being bad votes; but he found also that one of the votes was bad which was given for the relator, and this left the defendant still a majority of one vote.

The relator had objected also to the vote of one William Schofield, but this vote was, upon the facts proved, held good. The relator insisted that the vote should have been struck off as well as the other two, which would leave the votes equal, and so invalidate the defendant's election. It was on that ground that he made this appeal.

The facts were,—that Schofield had his dwelling house at Bowmanville in the county of Durham, where his wife and family resided, but that he had a saw-mill in the township of Cartwright, and carried on other business there, which occasioned him frequently to visit that place, and while he was there he was accustomed to board with one of his hired men in a house which he himself owned. At the election held at the same time for Bowmanville he had voted there, before he gave his vote at Cartwright.

On the part of the defendant it was sworn by Schofield that at the time of the election he was a freeholder in Cartwright, and was duly rated on the collector's roll as such for the preceding year, for property within the third ward: that he had a saw-mill and store there which he superintended, and that he was postmaster for the village in the said ward. He swore also, that his business lay in Cartwright, and that he resided there, in the said ward, *to attend to his said business*: that he was possessed of two dwelling-houses in the said ward, in one of which he resided with one of his workmen. His family, he said, resided in Bowmanville, but that *he resided in Cartwright, as aforesaid, to attend to his said business*. He added that Taylor, the candidate opposed to Cæsar, objected to his vote when he came to give it for

Cæsar, but stated that if he, Schofield, would take his oath that he was a resident of the ward number three, his vote should be accepted : that he did take such oath, and that his vote was thereupon recorded.

The statements of Schofield were confirmed by other evidence, as to his being the owner of two dwelling-houses within the ward in question, and his carrying on business and keeping the post-office there ; but neither he nor any other person stated what portion of his time was spent there and away from his family, nor whether he lived more at the one place than at the other. It was not denied that he voted at the election at Bowmanville.

C. Robinson shewed cause and cited 16 Vic. ch. 181, sec. 10 ; Sto. Confl. Laws 51 ; and as to the point of estoppel, *Reg. ex rel. Preston v. Preston*, 2 Chamb. Rep. 178. See also *Regina v. The Inhabitants of Stapleton*, 1 Ell. & Bl. 766 ; *McDougall v. Paterson*, 11 C.B. 755.

ROBINSON, C.J., delivered the judgment of the court.

We cannot say that we have any doubt that Schofield's vote should have been rejected, which would make the numbers equal, and in consequence make a new election necessary.

By voting as he did at Bowmanville he shewed plainly that he considered that to be his home, for otherwise he had no right to vote there ; and it is clear that, as the law stands, he could not be entitled to vote at both places, for he could not be considered to be at the same time resident at both places within the meaning of the municipal acts.

If his right to vote at Bowmanville had been the question in dispute it ought, for all that appears to us, to have been decided in his favour, for his dwelling-house was there and his wife and children there, which made that his home, and an occasional absence from home to attend to his business did not make the place where his family dwelt less his home. If he had no dwelling-house and family at Bowmanville, and no other home than at Cartwright, then his boarding there with one of his workmen would not prevent that from being treated at his place of residence, but it is quite otherwise

when he had his dwelling-house and family at Bowmanville, and actually voted at the election there as a resident of that village.

It would have been satisfactory to us, if we had been told on what grounds the learned Judge of the County Court confirmed Schofield's vote given at Cartwright, and if the affidavits had shewn distinctly than they have done the distance between the two places,—whether the voter spends more of his time in one than in the other,—where he usually sleeps, and how he conducts the post-office; that is, through the agency of a clerk or in person. But so far as the facts are stated, they tend to shew Bowmanville to be his place of residence, and not Cartwright; and if so, then the statement that at the election the relator said if he would swear that he was a resident in Cartwright he would not object to his vote, cannot, we think, be allowed to estop the relator from afterwards questioning the vote.

We have to try the question of the vote being good or bad, notwithstanding any such admission of the parties, otherwise the candidates at an election might, so far as they were concerned, place the election in other hands than those the law provides for, by an understanding among themselves.

We direct that a a peremptory mandamus shall go for holding a new election, and that the judgment be reversed with costs, which will include those of the court below as well as of the appeal.

Rule absolute.

REGINA EX REL. MOORE V. MILLER.

Disqualification—Contract with corporation—12 Vic. ch. 81, sec. 132, 16 Vic. ch. 181, sec. 25.

The defendant was elected alderman for a ward in the city of Hamilton. It appeared that before the election he had tendered for some painting and glazing required for the city hospital:—that his tender was accepted, and that he had completed a portion of the work, for which he had not been paid. A written contract had been drawn up by the city solicitor, but not signed by defendant; and he swore that before the election he informed the mayor that he did not intend to go on with the work.

Held (reversing the judgment in chambers) that the defendant was disqualified, as a contractor with the corporation:—that it was immaterial whether the contract would be binding on the corporation or not; and that his disclaimer could have no effect.

The defendant, James Miller, was duly elected as alderman of St. Lawrence Ward in the city of Hamilton, at the election holden on the 2nd and 3rd of January, 1854. At the instance of this relator, a summons issued in the nature of a *Quo Warranto*, under our statute 12 Vic. ch. 81, the objections to the election being stated to be, 1st. That previous to and at the time of the election the defendant had a subsisting contract in his own name and right with the city of Hamilton, in which he resides, for painting for the said city, duly made and entered into between him and the municipal council of the city, which contract is still in part unperformed and unfinished—and it was averred in the statement that the relator was entitled to be returned, being duly qualified, and having received the next greatest number of votes after the defendant.

The facts appeared to be these:—

The corporation of Hamilton advertised for tenders for painting and glazing required to be done to the city hospital. On the 4th of June, 1853, the defendant sent in a written tender offering to do the work according to the specifications, finding all materials, for £67 15s.

This tender was accepted by the committee of the city council to whom it was made, and was reported by them and adopted by the city council, and entered in their books as accepted, and the acceptance notified to the defendant. This was sworn to by Mr. Ford, who was, during last year, an alderman of the city, and chairman of the hospital committee, and who stated further, that the defendant

entered upon the performance of the work, in pursuance of his contract, and had completed a portion of it, but had, as he believed, not yet been paid for the same.

On the other side it was shewn that the relator himself did about the same time become bound to the corporation for the due performance by one Hall of a contract for carpenter's work to be done to the same hospital to a much larger amount, which contract was still subsisting, and was in the course of being executed by Hall, and that no settlement had ever yet taken place with Hall for the said work done by him. This proof was advanced for the double purpose of shewing that this relator became a candidate at the election while laboring under the same disqualification of being a contractor with the corporation which he alleged against the defendant, and was therefore precluded from setting up such an objection, and further, that he was disqualified at all events from being returned.

The defendant Miller filed his affidavit, in which he swore that he never entered into any contract with the corporation of Hamilton, as stated by the relator and by Ford, nor into any contract with any other person on behalf of the city for that work. He admitted that he tendered, and that his offer was accepted, but only conditionally, as he said (by which it was explained he meant that he was required to find sureties, which he had not done). He said that a contract was drawn up by the city solicitor, but that he refused to execute it, and never did execute it; and that all that passed between him and the corporation respecting the work was his tender, the acceptance of it, and the report of such acceptance made by the committee to the council. He swore, however, that in pursuance of his tender, and after he refused to sign the agreement, he did painting at the hospital to the value of about £8, "but that afterwards, and before the election, he informed the mayor that he did not consider himself bound to do the work, *and did not intend doing it.*"

Nothing was given in evidence by the defendant to relieve himself from the imputed disqualification, except what was thus stated in his own affidavit. He produced no proof from the clerk or solicitor of the corporation, or the

hospital committee, to shew on what footing he did in fact stand in regard to the alleged contract; or that he did refuse to execute a written agreement, and if so, on what account; nor that he was required to find sureties and declined doing so, nor why he went on with the work, if he did not mean to abide by his tender; nor why he discontinued the work; nor whether he had been in any manner released from his tender, or applied to be so released.

The learned Chief Justice of the Common Pleas, upon hearing the parties in chambers, thought it not sufficiently established that the defendant at the time of the election was a person having an interest or share in any contract with or on behalf of the city, within the meaning of 12 Vic. ch. 81, sec. 132, and 16 Vic. ch. 181, sec 25; and he determined that the defendant was not disqualified, and adjudged that the relator should pay the defendant's costs.

Crickmore moved to reverse this judgment wholly or in part, or that it be adjudged that the defendant be removed from the office of alderman of St. Lawrence Ward in the city of Hamilton, and the relator be declared duly elected; or that the election of the defendant be declared void, and that he be removed and a new election ordered. He cited *Regina v. Francis*, 21 L. J. (Q.B.) 304, S. C. 16 Jur. 1046.

Vankoughnet, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We are sorry that we cannot take the same view of this case that has been taken by the learned Chief Justice. The contract, to be sure, was not a very considerable one in point of amount, but the statute is very peremptory where the provision does apply, and does not allow any discretion to be exercised on account of the insignificant amount of the interest. It is not indeed upon any consideration of that kind that the learned Chief Justice founded his decision.

As to the description of the contract, I mean with reference to its subject matter, there is certainly no room for doubt. A person contracting to do a job of painting for the corporation would be a contractor of that kind that was intended to be disqualified, whatever might be thought of the reasonableness

of holding a lessee of the corporation to stand in that light merely by virtue of his lease, or persons standing in other situations that might be suggested. The only room for doubt, we think, is upon that point on which the learned Chief Justice felt it right to hold that the case was not supported.

The enactment 16 Vic. ch. 181, sec. 25, is, "that no person having by himself or partner any interest or share in any contract with or on behalf of the city, &c., in which he shall reside, shall be qualified to be or be elected alderman or councillor for the same, or for any ward therein." Now it may be quite true that at the time of the election there was no valid executory contract subsisting between the defendant and the city of Hamilton upon which the corporation could be held bound by any special stipulation; though that the corporation could upon this ground—that they had executed no agreement under their corporate seal—effectually resist payment for the work and materials which the defendant had applied in painting the hospital, provided his failure in finishing the work was not fairly to be ascribed to his own choice or caprice, is, to say the least, I think, doubtful. However, the question is not merely whether the corporation were bound to the defendant by a valid contract in respect to this work. In the case cited of the *Queen v. Francis* (21 L. J. Q. B. 304) the court, in a similar case, held that they could not look to see whether the contract was binding, so as to support an action at law against the council. "It would be monstrous," the Lord Chief Justice said, "to hold that the disqualification did not attach, because the corporation could not be compelled to perform the contract."

It is true that the English statute 1 Vic. ch. 78, sec. 23, varies from ours in one particular. It disqualifies any person from being elected a councillor during such time as he has any share or interest in any contract *or employment* with, by, or on behalf of the council. Our statute uses the term *contract* only, not *contract or employment*.

But here was a contract binding upon the defendant. Tenders had been offered by him and accepted by a committee, and on the acceptance being communicated to him in writing, he felt himself so far a contractor that he went

on with the work. We cannot tell what questions may spring up in the present year between him and the corporation, either in respect to the work he has done, or in respect to his right or obligation to finish it. The legislature intended that upon any questions of that kind occurring the council should be composed of disinterested persons. The legislature may not have meant to be so rigid, and if not they will perhaps think it expedient to make the enactment more explicit and guarded; but, on the other hand, to provide that the disqualification should only apply where the corporation has executed a sealed instrument, would be opening a door to evasions that might render the enactment of little use.

We cannot think that it was in the discretion of the defendant to escape from the effect of the disqualification at his pleasure, by simply breaking off the work, and saying he meant to do more, especially while he has not been settled with for what he has done.

We are on these grounds of opinion that the judgment should be reversed with costs, and that a mandamus should go for a new election, under the facts sworn to.

DRAPER, J.—It is with very unfeigned distrust of my own opinion that I have arrived at a different conclusion from the learned Chief Justice of the Common Pleas.

Here the corporation of the city of Hamilton called for tenders to paint the hospital. The defendant tendered; his tender was accepted by a committee of the Common Council; a contract was prepared, which the defendant refused to execute, and, looking at some of its provisions, not without some shew of reason. Had it stopped here I should have agreed that there was not sufficient proof of his disqualification; but he then, after objecting to the form of the contract, begins the work he had tendered for, and which I think it reasonable to assume he would not have been permitted to begin but for his tender and acceptance; and shortly before the election, and having done work worth, on his own statement, about £8 or upwards, he informs the mayor he does not intend to do any more, and becomes a candidate, and is elected.

I cannot look upon his commencement of the work under the circumstances in any other light than as a recognition of a complete contract in fact, though not legally assented to in point of form. I do not think his disclaimer of intention to proceed, as stated by himself, and it must be remarked by himself only, amounts to anything; and, as it appears to me, his case falls within the spirit, and I am disposed to think within the letter of the act. For all that is shewn the corporation are in a position to compel him to execute a contract, to complete the work, or to recover damages against him for the refusal. The act did not, as I construe it, mean that a party so circumstanced should be eligible as an alderman.

BURNS, J., concurred.

Rule absolute.

IN RE BARCLAY AND THE MUNICIPAL COUNCIL OF DARLINGTON.

Power of Municipal Corporations with respect to taverns under 13 & 14 Vic. ch. 65, sec. 4—Misnomer "Municipal Council" for "Municipality"
12 Vic. ch. 81, secs. 2, 31.

Held on an application to quash a by-law, that a rule nisi entitled as against "The Municipal Council" of a township, instead of "The Municipality" was sufficient, though the latter is the proper designation.

Held, also, that under 13 & 14 Vic. ch. 65, sec. 4, the municipal corporations had no power to pass a by-law prohibiting altogether the licensing of inns for the sale of wines or spirituous liquors by retail, or to be drunk therein; but that the legislature, by the words used in that section, either meant to give authority to prohibit the licensing of houses of public entertainment only as distinct from inns (the one having a public bar-room and the other not), or, if they meant inns, that they meant only to give the power of preventing any one or more particular inns from being licensed.

C. Robinson obtained a rule nisi to quash, wholly or in part, with costs, a by-law of the Municipal Council of Darlington, passed on the 7th of February, 1853, intituled "A by-law to prohibit the opening of any houses for the retail of wines or spirituous liquors, ale, cider, or intoxicating beer, &c., in the Municipality of the Township of Darlington, and for other purposes therein contained,"—on the ground that it wholly prohibited the opening or keeping open a house for the sale of wines or spirituous liquors by retail, or to be drunk therein, and that the enactments of the said by-law were illegal, and beyond the power of the said Municipal Council to make or enforce.

The by-law recited that it was necessary to prohibit the

licensing or opening of any house for the sale of wines, or spirituous liquors, ale, cider, or intoxicating beer, within the limits of the Municipality of the Township of Darlington; and enacted "that if any person shall open or continue open a house for the sale of wines or spirituous liquors, ale, cider, or intoxicating beer, by retail, or to be drunk therein, within the limits of the said municipality, after the first day of March next, he, she, or they, shall, upon conviction thereof before the town-reeve and any one or more justices of the peace having jurisdiction in the said municipality, upon the oath of one or more witnesses, or upon the confession of the party charged, forfeit a sum not less than two pounds, nor more than five pounds, for each and every offence, together with the costs of prosecution." Provision was made for levying the penalty and costs according to the statute 6 Wm. IV., ch. 4, and, in default of distress, the offender to be committed to gaol for a term not exceeding twenty days. It contained two other clauses not material to be stated.

Richards shewed cause.

In opposition to this motion to quash the by-law, it was shewn that it had been repealed by a by-law passed on the 10th of December, 1853, after the rule nisi to quash had been obtained; and it was sworn that on the repeal of the said by-law, another by-law was prepared by the same municipality for preventing the sale of intoxicating liquors within the said township, which was submitted to the municipal electors of the township for their approval, as provided by statute 16 Vic. ch. 184, sec. 4; and the object of repealing the by-law which had been moved against was to submit the question of prohibition to the electors.

Also, that after the first of March, 1853, there was no by-law of the municipality in force relative to the granting of licenses for the sale of liquors in houses of public entertainment, or for licensing such houses or inns, or ale or beer houses; and that no such licenses were granted or issued for 1853 by the said municipality.

On this state of facts it was urged by the counsel for the applicant, that, although the rule for quashing the by-law could not be made absolute, because it had been repealed since

the rule nisi to quash it was obtained, and was no longer in existence, yet that, on the authority of the case of *Coyne v. The Municipal Council of Dunwich* (8 U. C. R. 309), the applicant should have his costs of the application.

On the other side this was opposed, on the grounds—1st. of irregularity in the rule nisi, the same being entitled, *In re Barclay and "The Municipal Council of the Township of Darlington"* instead of "*The Municipality*" of the Township of Darlington, as it should have been entitled in accordance with the statute 12 Vic. ch. 81, sec. 2 and sec. 31. The affidavits on which the rule nisi was obtained were entitled in the same manner as the rule. In support of this objection the case of *Sams v. The Corporation of Toronto*, 8 U. C. R. 181, was cited.

2ndly. That the defendants had authority to pass the by-law complained of, under 13 & 14 Vic. ch. 65, sec. 4.—14 & 15 ch. 120, and 16 Vic. ch. 184, were also referred to.

ROBINSON, C. J.—Upon the first point, the entitling of the rule, if we may judge from the printed reports of the cases in which we have been asked to quash by-laws, it has been very common to entitle affidavits and rules in such cases in the same manner as these are entitled. It appears indeed to have been the prevailing course in this court, though there are one or two instances of the more proper form of entitling, viz., "*The Municipality of the township of, &c.*" being used.

In the case of *Hawkins v. The Municipal Council of the United Counties of Huron, Perth, and Bruce* (2 C. P. 72) the effect of the council themselves using an incorrect corporate name in their by-laws was much considered. There the by-law was stated on the face of it to have been passed by "*The Warden and County Council of the united counties of Huron, Perth, and Bruce.*" According to the statute 12 Vic. ch. 81, sec. 32, it should have been stated to have been passed by "*The Municipal Council of the united counties of Huron, Perth, and Bruce.*" The court held the deviation from the proper corporate name to be no sufficient ground for quashing the by-law. That case and the cases in this court of *Sams v. The Municipal Council of Toronto* (8 U. C. R. 181), and *Fisher*

v. The Municipal Council of Vaughan (10 U.C.R. 492), are the authorities most in point upon the question of misnomer, and all, I believe, in our courts that have any material bearing upon it. They are not decisive upon the question that is raised here; but so far as they do bear upon it, they make rather against the exception. The statute 12 Vic. ch. 81, in the second section, provides, that the powers given to the corporation of each township shall be exercised "*by, through, and in the name of* the municipality of each township respectively." That, it is insisted, compels them to do everything in the name of "The Municipality of the Township of ———." It does, I think, make that the proper formal designation; but in the case I have cited, of *Hawkins v. The Warden and County Council of Huron, Perth, and Bruce*, it was held that an act done by a county council in a name not exactly corresponding to that given to them by the statute, which is "the Municipal Council of the county of——," might nevertheless be valid.

The variance here is between "the Municipal Council of the Township of Darlington,"—the name used—and "the Municipality of the Township of Darlington," the name which the statute appears to have intended should be used. The question is, whether the terms "municipality" and "municipal council" are sufficiently identical. They do not in strictness mean the same thing, because the "municipality" comprehends the inhabitants of the township; and though the municipal council represents the inhabitants, yet they are but a portion of them. The legislature, in the statute 12 Vic. ch. 81, preserves the name "municipality" in general throughout when speaking of townships, and uses the term "municipal council," when speaking of counties, but sec. 13 of the statute, shews that they used the term "municipality," when speaking of townships in such a sense as not to be applicable to all the inhabitants, or, in other words, to the corporation, but only to the "municipal council" of the township, and so indeed do the 14th and 31st clauses; and others shew very clearly that *the municipality* is the term used when the municipal council was alone in view; and, indeed, when they enact in the beginning of the 31st section that "the *municipality* of each of the townships" shall have power to make

by-law for certain purposes, and add at the end of the section, "as the good of *the inhabitants* of such township may in *their* opinion," that is, in the opinion of the municipality, "require," they shew clearly that they mean by the term "municipality," not the whole corporate body, which includes the inhabitants, but the council, who are to represent them, and think and act for them.

In several clauses of this act the term "municipal corporation" is applied when speaking of incorporated villages though "municipality" is the term assigned to them as their corporate name, as expressly as it is for townships. So with respect to cities, the name by or in which they are to exercise their powers is "The Mayor, Aldermen, and Commonalty of the City of ——" ; but in various parts of the same statute "*the common council*" are spoken of as the body to make laws, and for other purposes to bind the city; and the 148th section shews that the legislature used the terms *municipal corporation* and *municipal council* as convertible terms, for they provide there, that at any meeting of any "municipal corporation" under the act, a majority of those who shall by law form such corporation (which clearly means the municipal council) shall be a quorum for the despatch of business.

Throughout the Common School Act, passed in the same session, the municipal council of the township is everywhere spoken of as the corporate body. In the Assessment Act, passed in the following session, the distinction seems carefully preserved.

In the Municipal Council Amendment Act 16 Vic. ch. 181, the "municipal council" is used as designating the corporation, and as an equivalent term to "municipality" or corporation. If we should have occasion to act in any matter under the 4th clause of the act, which regards arbitrations, the term "municipal council of the township of ——" would seem to be the one proper to be used in the proceedings.

Again, the Assessment Act of last session, ch. 182, and the statute of the same session, ch. 183, apply the term "municipal council" in speaking of townships very generally, when the framers of the first municipal act would have used the word "municipality."

When the legislature have in so many instances used the terms indiscriminately, I do not think we should embarrass these proceedings and add to the expense of them, by holding parties strictly to the very name given in the statute; and certainly if all that the township councils are required to do in the name of the "municipality" were to be held void, when they assume to do it in the name of "the township council of the township of——," I apprehend great confusion must be created, for this latter name seems to have been very frequently used as the corporate name.

With respect to the objection to the by-law, this court determined in the case of *Baker v. The Municipal Council of Paris* (10 U. C. R. 621), in which the construction and effect of the statute 13 & 14 Vic. ch. 65 was in question, that the council of an incorporated village could not make a by-law prohibiting the keeper of an inn, not merely from allowing persons to remain tippling in his bar-room on a Sunday, but from selling on a Sunday any liquor to be drunk in any manner by any person in his house. That would make it illegal for any traveller calling at an inn, or any person lodging in the inn on that day, to obtain any spirituous liquors, or wine, or beer in any quantity, to be taken with his meals.

The 4th clause of that act did, no doubt, give to the municipal councils power to prohibit altogether the issuing of a license for keeping a house of public entertainment within their respective localities, but not power, as we thought, to grant the license, and yet prohibit the person licensed from selling liquor to a traveller, or a lodger, to be consumed in his house, on all or any of the days of the week; because, if the innkeeper could not sell in any manner on that day, the traveller or lodger could not obtain it, and the effect of such an enactment would go farther than to prohibit or restrain tippling or disorderly conduct; it would disable travellers or lodgers from obtaining at an inn on the Sabbath, or any other day that might be mentioned in the by-law, such refreshment as it has not yet been made illegal for travellers and lodgers to consume. The legislature may have meant to commit to the municipal councils a power to impose such disabilities, but

it appeared to us that it was necessary that they should have done so in express terms ; for, otherwise, under a power to regulate, the municipal councils would be assuming by construction a power to prohibit. If they could legally deny to a traveller or a person lodging at an inn the power of obtaining any spiritous liquors, or wine, or beer on a Sunday, they could equally do so on any or every other day, for the extent to which they could carry their prohibition would be a matter in their own discretion, and the power to prohibit indiscriminately could, on the same principle, be exercised to the full extent with regard to any day in the week.

We see it stated in the 14 & 15 Vic. ch. 120, what the legislature did mean by the former act, and we must look at these two acts, and then bear in mind that the objection taken to this by-law is not, as it was in Baker's case, that it prohibits the selling to any one on a Sunday any spirituous liquor, &c., in an inn which had been duly licensed to sell such liquors but this by-law passed in February, 1853, provides, "that no person shall open or continue open a house for the sale of wines or spirituous liquors, ale, cider, &c., by retail or to be drunk therein, after the 1st of March, 1853."

In the former case the by-law assumed to prohibit entirely the sale on a Sunday of liquors in houses that were actually licensed. In the present case the question is, whether the municipal council had or had not power to avoid licensing any such houses, which is a totally different question.

When one looks at the different enactments, it must be admitted that it is no easy matter to find from them what the legislature did mean, in regard to the power given by 13 & 14 Vic. ch. 65, sec. 4, when it is enacted that the municipality of any township shall have authority at any time after the passing of that act "to make by-laws for limiting the number of inns or houses of public entertainment in such township, &c., for which licenses to retail spirituous liquors to be drunk therein shall be issued, to be in force after the last day of February, 1851, (*or for prohibiting theis suing of any such licenses for any house in their respective municipalities and for fixing the terms and conditions, which shall be previously complied with by any person desiring such license,*" &c.

I am not certain whether in the words "*for any house,*" used in this parenthesis, which gives rise to this question, the legislature meant to include inns and taverns, or only *houses of public entertainment*, as something distinct from inns and taverns. The words used there would by natural construction extend to inns and taverns, and certainly the by-law which is now in question must be understood to extend to inns and taverns, for every inn *is a house for the sale of spirituous liquors by retail or to be drunk therein*, except such as are conducted upon the temperance principles, which of course would not be affected by this law. The by-law does not qualify, as the statute does, the word house, by adding the words "of public entertainment."

If the words in the parenthesis of the 4th clause of 13 & 14 Vic. ch. 65, were meant to include inns and taverns, what should we take to be the object and extent of the words in that parenthesis? Looking, in the first place, at the words as they stand in that statute, and without explanation from any act afterwards passed, what do they import? Is it, that the municipalities may prohibit the issuing of any tavern licenses *whatever* within their municipalities, or that they may prohibit the licensing of any one or more taverns in particular, which they may think it unnecessary or improper to license? I am not able to convince myself that they meant only to give the power to prohibit some one or more particular inns to be licensed. It may be that they used the word "any" in that sense, but it seems to me to admit of too much doubt to enable us so to construe it.

But I find it difficult to satisfy myself that the words in the parenthesis were intended to apply to inns at all. In the 4th, 5th, 6th, & 7th clauses, inns and taverns are spoken of as something distinct from houses of public entertainment, and not meant to be confounded with them. And, if we attend to the provisions in the 6th & 7th clauses, we can have no doubt that the legislature, when they speak of houses of public entertainment in this statute, do not always mean to include inns—the distinction, I suppose, being that the one has a public bar-room and the other not.

I do not think that the legislature intended by this act, 13

& 14 Vic. ch. 65, to authorize municipal councils to abolish inns and taverns altogether within their municipalities, as places at which persons could be licensed to sell spirituous liquors at any time, to be consumed within the house by any person. It is to be considered that the officer who was to issue such licenses was not then a municipal officer, but an officer of the provincial government, though I do not see that that circumstance would disable the municipal council from prohibiting the issuing of any such licenses, if the legislature did really by that statute commit to them the power of doing so in their discretion. At present I incline to think that such was not the intention of the act. But we must look at the subsequent statutes on this subject, 14 & 15 Vic. ch. 120, and 16 Vic. ch. 184, to see whether they afford any help to the construction.

The statute 14 & 15 Vic. ch. 120, sec. 2, does not appear to me, when carefully considered, to bear at all upon the point, and so it affords no assistance. It declares that the 13 & 14 Vic. ch. 65, was meant to give power to pass by-laws to prevent the keeping of inns, taverns, or houses of public entertainment, by persons not thereunto duly licensed, but it does not declare that nothing more was meant than that, and that it was not intended to enable the municipal councils to pass by-laws to prevent the issuing of licenses.

Then comes the act 16 Vic. ch. 184, secs. 3 & 4, which, being passed after the by-law now in question, can only be important as it may serve to throw light upon what was intended to be provided by the previous acts. The 2nd section of the 3rd clause does not seem to me to be intended to apply to inns or taverns, or to houses of public entertainment. The 4th clause, by the proviso in the latter portion of it, does appear to me to shew that the legislature could not have meant by the 13 & 14 Vic. ch. 65, to allow the municipal councils to prevent any inn whatever from being licensed within their municipalities, at which liquors could be in any manner sold; for, if they did so mean, it would seem strange that when they now in this act do for the first time in clear and unequivocal language give the power to prohibit the keepers of houses of public entertainment from selling liquors, they should think

it right to guard the exercise of that authority by such precautions as they have done, precautions which are wholly wanting in the statute 13 & 14 Vic. ch. 65.

The best opinion I can form upon this case is, that by the statute of 13 & 14 Vic. ch. 65, the legislature either meant to give authority to prohibit the licensing of houses of public entertainment only, and not inns, or, if they meant inns, that they meant only to give the power to place a veto upon some one or more particular inns being licensed, not authority to abolish all licensed inns.

I think, therefore, that the by-law now before us, passed in February, 1853, goes further than the municipal council had power to go, in prohibiting the opening of *any house* for the sale of wine, spirits, beer, ale, or cider, by retail, to be drunk in such house.

If we are right in this view, then the by-law was illegal; and being moved against while it was in force, though it has since been repealed, such repeal, as we have determined in a similar case, though it renders it needless to make any order respecting the by-law, makes it right that the rule should be discharged on paying the costs of the application.

DRAPER, J.—I agree that we ought not to give effect to the formal objection, for the reasons stated by his lordship, though I much regret that the attention of the court was not drawn to this point in the earlier cases, for it would have been better to have adhered to the distinction which evidently was at first in the intention of the legislature—*municipality* of each township or incorporated village; *town council* of each incorporated towns; *mayor, aldermen, and commonalty* of each city; and *municipal council* of the county. But, as has been pointed out, the legislature has not been uniform in preserving the distinction any more than the court, and it is too late now to strive to maintain it.

The by-law objected to having been repealed, we should be spared the necessity of inquiry into the validity of its provisions but for the question of costs. The objection arises under the 13 & 14 Vic. ch. 65, sec. 4, which gives power to the municipality of each township to make by-laws “for

limiting the number of inns or houses of public entertainment in such township for which licenses to retail spirituous liquors to be drunk therein shall be issued, to be in force after the last day of February, 1851 (or for prohibiting the issuing of any such license for any house in their respective municipalities)," and "for regulating all such inns and houses of public entertainment." The sixth section makes it the duty of the inspectors of houses of public entertainment to see that the by-laws of the municipality are complied with, as regards *the person* to whom licenses to keep houses of public entertainment, and to retail spirituous liquors therein, *are to be issued*; and among the powers is one, that if the number of persons who shall have complied with the requirements of the by-law in that behalf should be greater than the number of persons to whom licenses may be issued under such by-law, then they shall determine *to which of such persons* licenses may be granted with the most advantage to the public. Now, if it was intended that this enactment should enable the municipality altogether to prevent the issuing of a license to sell wines, &c., we might expect that such intention, being contrary to the existing law, would be clearly expressed. I do not think the expression, "*limiting the number*," conveys such intention; for the duties assigned to the inspectors, in the event of the number being limited, shews that the legislature contemplated the fixing a number not to be exceeded, and not the prohibition of the issuing of any license. Then we are reduced to the words within the parenthesis, which being introduced in that way would rather seem designed to be a special or particular matter, relative to the general power already conferred, than to be a conferring of a more general and extensive power than those given by the words in reference to which the matter in parenthesis is introduced. These words are "(or for prohibiting the issuing of any such license for any house, &c.)" If the words "*for any house*" had not been added, it would have been very difficult to say that the power of prohibition was not general; but when the power of prohibition is limited to the issuing of a license for any house, is it not the reasonable interpretation that the municipality might in their by-law except certain

houses which they might think fit to designate, from being licensed;—in other words, that no license should be issued for the sale of wines, &c., in the house or houses named? Looking at the frame of this act only, such is to my mind its proper interpretation. The different form of expression used in the excise duties transfer act (16 Vic. ch. 184 sec. 2), where a power of absolute prohibition is given, confirms me in this opinion.

But the act 14 & 15 Vic. ch. 120 was passed to remove doubts as to the true intent and meaning of the prior statute; and by section 2 it is declared and enacted that it was and is the intention of the prior statute that the municipality of each township, &c., “should have, and that they have and had respectively, from the time of the passing of the said act, power and authority to make by-laws for preventing the selling of wines or spirituous liquors, *or* the keeping of inns, taverns, or houses of public entertainment, *by persons not thereunto duly licensed.*” Now this explanation is very clearly expressed, and gives us with equal clearness to understand what doubts (which the recital does not explain) it was intended to remove. But it is to my mind equally clear that this declaratory act does not touch the question now before us,—viz., that of the power of the municipality to prohibit the sale of wines, &c. The latter enactment clearly declares their power to prevent the selling of wines, &c., or the keeping of inns by persons not thereunto duly licensed; but between that and the power of preventing the issuing of licenses to sell wines, or keep inns, the distinction is sufficiently obvious. It is only by reading the words “by persons not thereunto duly licensed,” as confined to the keeping of inns, taverns, or houses of public entertainment, that the former words, “for preventing the selling of wines or spirituous liquors,” can be made of universal application; a construction which is the more difficult, because, in order to make sense, one is compelled to read the words “*for preventing,*” as over-riding both branches of the sentence, and the latter words, “by any person,” &c., appear to relate equally to the selling of wines *or* the keeping an inn. If “and” had been used instead of “or” it would have been

easier to confine the latter words to the keeping of an inn, &c., and to leave the other power without any such limit.

Certainly the terms of the proviso to the 4th section of 16 Vic. ch. 184, by which no by-law to be made after the passing of that act, "under the authority of the act passed in the session held in the 13th and 14th years of Her Majesty's reign, and intituled 'An act to amend the laws relative to tavern licenses in Upper Canada,' for prohibiting the sale of wine or spirituous liquors, ale, or beer, in any house or public entertainment in such municipality, shall have force or effect" unless approved by a majority of the municipal electors, do not remove the difficulty, though they do tend to shew that by the legislative construction the power of prohibiting extended to *every* house of public entertainment in the municipality, and was not designed to be limited to any particular house or houses of that character which might be designated, leaving the question as to the meaning of the words "*any house*" in the parenthesis untouched.

Upon the whole, I am of opinion the by-law is bad, for the objection taken.

BURNS, J.—I do not think there is anything in the objection that the rule should have been entitled, and that it should have called upon, *the municipality* of the township of Darlington. No doubt the proper name of the corporation is the municipality of the township; as in the case of incorporated towns, it is the *town council* of the particular towns; or of cities, it is the *mayor, aldermen, and commonalty* of the particular city. Throughout the 12 Vic. ch. 81, the term *municipal council* is not applied to townships, but is always applicable to the county or union of counties; and wherever townships are spoken of they are designated by the term municipality. A clear proof of the distinct character of the names is contained in the 187th section of the act. If that had been preserved throughout the subsequent acts, I should have been disposed to think there might have been some weight in the objection made in this case. The statute 16 Vic. ch. 181, however, uses the terms *municipal council* and *municipality* as equally applicable to townships. The 4th

section of this last act calls the acting body of the corporation of the township the *municipal council*. Other sections speak of the *municipality*; but reading the 4th section with other sections, this last act of the legislature certainly does intend that both terms may be applied to townships, whatever the former intended. The statute 16 Vic. ch. 184 speaks in various clauses of the authority of the *municipal council* of the township. As the representing body of the municipal corporation of the township may be called the municipal council, and as that is the body making the by-law, I see no objection to that body being called on by the court to shew cause why the by-law should not be quashed.

The power first given to the municipality of the townships respecting inns, taverns, &c., was by the 14th subdivision of section 31, 12 Vic. ch. 81, and that power was for regulating them, also for limiting the number within the municipalities; and in all cases when there existed no other provision for licensing, then to provide for the proper licensing of such places at such rates as might seem expedient. Under this authority it is clear the municipality had no general power to prohibit the licensing or opening of houses for the sale of wines or spirituous liquors. At the time of the passing the act giving this power the granting of licenses and the revenue arising therefrom belonged to the Provincial Government and the power thus vested in the different municipalities had previously been vested in and exercised by the magistrates in Quarter Sessions. It should be recollected also that at that time no power existed to recall the license after it was once granted; and the only way in which an innkeeper was deprived of his license was upon being convicted by a jury at the Quarter Sessions for keeping a house contrary to the regulations. The magistrates had, and—as is very well known—did exercise a discretion in granting licenses, both as to individuals and as to the number there should be on any particular line of road or locality; but having once granted the permission to the inspector of licenses to issue the license to any person, the magistrates had no further control over it for the current year. The next act upon the subject is 13 & 14 Vic. ch 65, and this act in addition to the former

powers, after repeating them, goes on to say, the municipalities shall have power for prohibiting the issuing of such licenses for any house in their respective municipalities; and then the act goes on further and says, the municipalities shall have power for fixing the terms and conditions to be observed by any person desiring such licenses, and the description of house he shall have and maintain. The question is whether this power was a general power of prohibiting inns altogether or whether the power is confined to prohibiting any particular house. That we may be able to solve this point satisfactorily we must understand how and in what mode the granting of licenses was carried out. The magistrates when they exercised the power, did not do so by any general by-law limiting the number intended to be granted on any particular line of road or locality, but always decided upon each applicant as he presented himself for an authority to keep an inn or house of public entertainment. The power transferred to the municipality is not that of deciding upon each particular applicant, for the applicant does not now ask for a license from the municipal council; but, if he has complied with the rules and regulations imposed by the by-laws of the municipality, he applies to the inspector for his license. The municipal council could not know the persons to whom licenses might be issued, as the magistrates in sessions did know before being issued. Thus we have a key to solve what was meant by the legislature. I take that meaning to be this—that the municipal council had authority to pass a by-law limiting to any street or particular line of road or locality, to the extent of the municipality, the number of inns and houses of public entertainment there should be within that space or distance; and that, as the council could not know the persons who might be applicants for licenses, they had the power by a by-law to restrain the inspector from granting a license to any particular house that might be named in addition to limiting the number generally. This, I think, is made apparent by the proviso in the 6th section, that if the number of applicants for licenses, be more than the number limited by the by-law, the inspectors shall determine, subject to the by-laws passed for their guidance, to which of such persons

licenses may be granted with most advantage to the public.

The municipal council might by a by-law say to the inspector that upon such a line of road or locality we restrict the number you are to grant to so many ; but, notwithstanding that there are certain houses or a house on the road, and we prohibit you from granting that particular house or house a license at all. It is plain to me, taking the whole scope of the act, the powers transferred to the municipality, and the mode and manner in which those powers are to be exercised and carried out, the legislature did not, and did not intend by that act to confer a general power of prohibiting inns or places of public entertainment, but only a limited power in the mode I have mentioned.

The 14 & 15 Vic. ch. 120 is a declaratory act, but contains no declaration upon the present point. The word *licensed* in the 2nd section applies to all,—those selling wines and spirituous liquors, as well as those keeping inns, taverns, or houses of public entertainment,—and therefore no more extensive power is conferred by that act, or any interpretation of the power which throws any light upon the present question.

The statute 16 Vic. ch. 184 is not necessary to be considered, further than as the powers are very materially increased which have been vested in the municipality ; and as the revenue from these licenses has been surrendered to the corporate bodies respectively, it may be used as an argument to shew that the legislature did not consider they were re-enacting an already existing power altogether, but, in fact, were giving new and more extensive powers ; and that such extended powers were to be exercised under certain restrictions, whereas if the power existed before it was without restriction. Without the assistance of such arguments, however, it is clear to my mind the Municipal Council in the present case exceeded the power and authority conferred upon it by 13 & 14 Vic. ch. 65. when it took upon itself to determine that no licenses should be granted within the municipality.

Rule discharged, on payment of costs.

CASPAR V. HERSCHBERG.

Assumpsit—Plea of satisfaction as to part—New assignment thereto.

The plaintiff declared in *assumpsit* for 100*l.* due for goods sold and delivered money lent, &c. &c. The defendant pleaded, as to 50*l.*, parcel &c., that he gave his promissory note before action commenced for 50*l.* payable in three months; that it was accepted in satisfaction of so much of the demand, and was not due when this action was brought. The plaintiff replied that he did not receive the note in satisfaction; and he now assigned that this action was brought not only for the causes of action covered by the plea, but also for other and different causes of action as parcel of the causes of action declared on—that is, for other goods bargained and sold, &c. after the making of the said note.

Held: that the new assignment was unnecessary, and bad on special demurrer.

The plaintiff declared in *assumpsit* for 100*l.*, on the common counts, for goods sold and delivered, &c., money lent, money paid, &c.

The defendant pleaded, as to 50*l.* parcel of the sum demanded &c., that he gave his promissory note before this action was commenced for the sum of 50*l.*, payable in three months; that it was accepted in satisfaction of so much of the plaintiff's demand; and that the three months had not elapsed when this action was brought.

To this plea the plaintiff replied that he did not receive the promissory note in satisfaction of the £50, &c.; and he now assigned alleging that he brought this action not only for the causes of action to which the plea is pleaded, but also for other and different causes of action, as parcel of the said causes of action in the declaration mentioned; that is for other goods bargained and sold by the plaintiff to the defendant, &c., and after the making of the promissory note in the plea mentioned; and so on as to the different causes of action comprehended in the declaration.

The defendant demurred, objecting that this replication was double, and that the new assignment was inapplicable to the plea which does not deny the existence of other causes of action besides those answered by the plea, and only professes to be a defence to a specific portion of the demand.

S. M. Jarvis for the demurrer.

Hallinan contra.

The authorities referred to are noticed in the judgments.

ROBINSON, C. J.—It is not necessary to go into the question whether the replication is bad for duplicity, as containing

a traverse of the whole matter pleaded, and also a new assignment. That depends upon whether this declaration in assumpsit brings the case within the reasons upon which such a method of replying has been sanctioned in actions of trespass, where divers trespasses are charged to have been committed on different days, on which I think we need not now express any opinion, for the new assignment to a plea of partial satisfaction is in my opinion altogether inapplicable and irregular.

The plea is the same in effect as if the defendant had pleaded payment of 50*l.* of the demand, for satisfaction is only payment in a special manner. Such a plea leaves every demand which the plaintiff may have above 50*l.* unanswered and there can be no occasion for a new assignment. Pleas of payment of the whole or of part of the sum claimed are in daily use, and are constantly met by a simple traverse. There may have been, however, a new assignment in such a case, and, if not demurred to, the effect would be the same as if the payment had been merely traversed in the usual manner; that is, the plaintiff would have been obliged to shew that he had a demand which was not extinguished by the payment. If, for instance, the money had been paid expressly on account of some other debt, or on account generally, then the plaintiff would be obliged to prove some debt to which the sum paid could not be applied upon the evidence, or which it would be insufficient to cover.

Here the propriety of new assigning in such a case is made a question upon special demurrer, and I think we should determine it to be informal and bad on that account; that is, not bad in substance, but in form, as tending to embarrass the defendant in his pleading.

It is evident, I think, from the cases of *Freeman v. Crafts* (4 M. & W. 4), *Collins v. Aron* (4 Bing. N. C. 233), *James v. Lingham* (5 Bing. N. C. 553), *Moses v. Levy* (4 Q. B. 213), that no necessity has been imagined to exist for this mode of replying in such cases; but the plaintiff should of course have leave to amend on the ordinary terms. *Dite v. Hawker* (7 Jur. 768) is precisely the present case, and there it was decided that a new assignment was unnecessary. Mr.

Hallinan, no doubt, replied as he has done under an apprehension that he would find himself in difficulty if he did not new assign, and he seems to have been governed by the case of *Jubb v. Ellis* (15 L. J. Q. B. 94, 9 Jur., 057), on which case chiefly he relied; but when that case is examined it is really a strong authority against the propriety of new assigning in the present case, not only from the evident fact that it was the particular nature of the declaration there which led to the decision, but from the very language used by the court in their judgment. There a release had been pleaded to the whole cause of action, which was one of a special nature. *Patteson*, J. said, "Here the release would *primâ facie* apply to whatever is the subject-matter of the declaration," and from hence arose the propriety of the new assignment. But in the action before us the very reverse is this case; the plea of satisfaction of a part only of the demand has no application whatever to anything beyond that 50*l.*, and leaves the plaintiff perfectly at liberty to proceed in regard to whatever further demand he may have without new assigning.

DRAPER, J.—The declaration in this case is general. The plaintiff may prove any one or more of the causes of action stated therein to any amount, though his claim for damages is limited to 100*l.*

The plea is as general as the declaration, except as to amount. It professes only to have paid 50*l.*, but to have paid it on all causes of action which the plaintiff can prove under his declaration. As to more than 50*l.*, the defendant does not assert he has any defence, and therefore on this plea the plaintiff might have signed judgment for all above the 50*l.* pleaded to, whether he admitted or denied the truth of the matters stated in the plea.

Freeman v. Crafts (4 M. & W. 4), and *Dite v. Hawker* (7 Jur. 768), are strong in principle to shew that no new assignment can be necessary in this cause; and *Rogers v. Custance* (1 Q. B. 77), which was pressed on us in the argument, only shews that where the plea narrows the *cause of action*, as by stating the work sued for to be done under a special contract, and that it had been paid for under a subsequent agreement, the plaintiff, if he claim for work not within

the special contract, must new assign ; for by merely traversing the payment he admits that the work he is suing for to be done as stated in the plea, viz., under the special contract.

Jubb v. Ellis (9 Jur. 1057) was mainly relied on for the plaintiff. The action was debt in 10*l.* for goods sold, and on account stated. Pleas—first, never indebted ; secondly, that after the accruing of the debt in the declaration mentioned, and before the commencement of this suit, the plaintiff, by indenture, &c., released to the defendant the debts and causes of action in the declaration mentioned : the replication to which was *non est factum*. At the trial the execution of the release was proved, and that, at the time of executing, the plaintiff, with the defendants other creditors, agreed to take a composition on a debt due to him by the defendant, the goods, the subject of this action) which amounted to a small sum, compared to the debt for which the plaintiff accepted the composition) were returned to him. The defendant promised to return them, but did not do so, and since the release had admitted his liability for them, and had given the plaintiff an I.O.U. for the price. *Patteson, J.*, held this made a new assignment necessary ; because, as he says, “the declaration being general, and the release *not restrained to any particular goods*, the plaintiff ought to have new assigned.

The difference between that case and the present is obvious, for the plea here only professes to answer 50*l.*, and whatever sum the plaintiff can prove above 50*l.* is entirely unanswered, even if the plea be true. The only reason for a new assignment offered is, that if the plaintiff had a demand covered by this note, and also further demands amounting to damages claimed in the declaration, he would be precluded from recovering unless he new assigned. I do not perceive this to be a necessary consequence, but should rather hold that the case falls within the principle of *Alston v. Mills* (9 A & E. 248, *James v. Lingham* (5 Bing N. C. 553), *Moses v. Levy* (4 Q. B. 215), which shew that where the plea does not narrow the declaration, as in *Rogers v. Custance*, the plaintiff may prove his full demand, though exceeding the sum named in the declaration as that for which he sues, and, applying the payments proved, still recover any balance within

his declaration; and even were it otherwise, it would not shew the necessity of a new assignment, but rather that he should have applied to increase the damages in the declaration, as in *Collins v. Aron* (4 Bing. N.C, 233).

Judgment for defendant on demurrer (a).

WOODRUFF v. HARRIS.

British America Assurance Company—Transfer of stock, how far complete without acceptance—6 W. IV. ch. 20, sec. 5.

Certain stock in the British America Assurance Company was transferred by A., and the transfer entered in the stock ledger, so that the shares stood in the name of the transferee. Before any acceptance had been signed the shares were seized by the sheriff under an execution against the transferor. The transferee then signed a formal acceptance in the books of the company, and brought an action against the sheriff's vendee to recover the dividends which had been paid to him.

Held, that the transfer was complete without acceptance, as against the transferor and all claiming under him; and therefore that the seizure was illegal, and the plaintiff entitled to recover.

ASSUMPSIT for money had and received.

Plea—Non-assumpsit.

On the 3rd of June, 1850. an *alias fi. fa.* was delivered to the sheriff of the Home District, with directions to execute it by seizing and selling forty shares of stock in the British America Assurance Company, held by Thos. S. Smith, Esq., the defendant in the *fi. fa.*, against whom the suit was as executor of Col. Delatre. This defendant was plaintiff in the suit.

Under it the sheriff seized, and sold the shares to the present defendant, the plaintiff in this suit.

At the trial. at Toronto, before *Richards, J.*, the managing director of the Insurance Company proved, that on the 5th of August, 1849, the attorney for Mr. Smith, executor of Col. Delatre, had transferred these forty shares, on which £225 had been paid, to the plaintiff and the late H. Sullivan, Esq., trustees of the wife of the executor.

The power of attorney to Mr. Brock was deposited with the company, and the transfer signed in the transfer book of the company on the same day.

The plaintiff Woodruff did not sign an acceptance of the

(a) See *Butt and Jupe v. The Great Western R. W. Co.*, 11 C. B. 140, which strongly supports the judgment in this case.

transfer in the company's books until the 14th of January, 1851, and Mr. Sullivan died without having signed such acceptance.

The sheriff seized the shares under the *fi. fa.* on the 3rd of June, 1850, and sold them on the 24th of June, and transferred them in the books of the company to this defendant, who on the same day accepted them by his signature in the company's books.

Before the formal acceptance by the plaintiff of the stock, but after the transfer by the sheriff, the plaintiff gave notice to the company not to pay over the dividends to the defendant; but the company nevertheless had done so, and it was for the amount of the dividends so paid that the plaintiff sued in this action.

It was sworn by Mr. Birchall, the managing director, that transfers and acceptances are entered in a book kept for that purpose; and there is also a stock ledger, in which the transfers, after they have been completed and accepted, are entered, and in this stock ledger the transfer to the plaintiff was entered about a week after it was made, and before it had been formally accepted by the plaintiff; so that when the sheriff seized it, it stood in the name of the plaintiff and Mr. Sullivan, the trustees. This was done in anticipation of the assignees signing the acceptance.

There is no rule, order, or by-law of the company respecting the transfer of stock. It depends on the act of incorporation.

There could be no transfer of stock while there were unpaid calls, and on the day the transfer was made (5th August, 1849,) Mr. Brock paid, on behalf of the trustees, all the unpaid calls, amounting to £50. There had been no calls made since.

Upon this evidence the learned judge reserved it for the opinion of the Court, whether under the facts proved the stock was vested in the plaintiff at the time of its being seized and sold by the sheriff to the defendant; and the jury found for the defendant with leave to move to enter a verdict for the plaintiff for £31 10s.

J. B. Robinson, obtained a rule nisi accordingly.

Hagarty, Q. C., shewed cause.

The statutes and authorities referred to are noticed in the judgments.

ROBINSON, C. J.—Our statute 6 Wm. IV., ch. 20, sec. 5, is an amendment to the original statute which incorporated this insurance company, 3 Wm. IV. 3 ch. 18, and which provided that the stock should be transferable according to such regulations as the board of directors should establish, and that no transfer should entitle the transferee to a vote until ninety days after such transfer. The statute itself prescribed no form or method of making the transfer, and and it does not appear that any by-laws were made upon the subject, at least there is no evidence of any.

The amending act, 6 Wm. IV., ch. 20, sec. 5⁴ provides that the stock shall be transferable by the respective holders thereof; “provided always, that such assignment and transfer shall be entered in a book of the said company, to be kept for that purpose, and shall be signed by the person or persons respectively making and accepting such assignments or transfers, their respective attorneys or agents.” The 12th section enacts, “That after any instalment or instalments of the stock shall be called in, no transfer shall have any validity until such instalment or instalments on the same shall have been fully paid and discharged.”

The question to be determined in this case arises upon the 5th section, and it is this—whether the transfer made of the forty shares by the executor of Col. Delatre, through his attorney, on the 5th of August, 1849, was ineffectual to pass the shares until the acceptance of the transfer was signed in the book of the company by the transferee; so that, under an execution coming in the meantime against the personal estate of Col. Delatre in the hands of his executor, the transferror, the shares could be seized as still belonging to the executor, notwithstanding the entry of the transfer was signed in the company's books by the transferror, and notwithstanding the company had at the time of the assignment, or soon after, entered the shares in their stock ledger in the name of the transferee, the present plaintiff. The case in the court of Common Pleas of Upper Canada, of Brock v. Ruttan (1 C. P. 218) was cited in the argument of the present case, but it has no bearing on the question before

us. It turned upon other points, but the case cited in it of *Foster v. The Bank of England* (8 Q. B. 689), does, as it appears to me, apply fully to the present case.

This was decided upon an English statute, 1 Wm. IV. ch. 13, sec. 13, which enacts, "That the assignment or transfer shall be assigned by the parties making such assignments," and "that the person to whom such transfer shall be made shall underwrite his acceptance thereof," and that *no other method of assigning or transferring any such stock shall be good and available in law.*"

The plaintiff, Hannah Foster, had transferred shares of stock in the Bank of England to one McNeil, and had signed the transfer in the book, but the acceptance underwritten had never been signed by the transferee, and she afterwards sued the Bank of England for seven half yearly dividends, as being payable to her as holder of the stock.

The bank pleaded that she was not the proprietor of the stock, while any of the dividends were payable. The plaintiff relied upon the transfer being inoperative, because the transferee's acceptance had not been signed in the book. But the court held very clearly that the condition as to acceptance was only intended to operate as between the transferee and the bank, so that the transferee could not be treated by the bank as the holder, and in that capacity liable to calls, until he had accepted, but that the transferor was bound by the transfer signed by her and entered in the books. The same question arose in England many years before, in a criminal case, *Rex v. Gade* (2 Lea. Cr. Ca. 732), where it turned upon a statute containing the same provision as that in 1 Wm. IV., ch. 13. "that no other method of assigning or transferring the stock should be good and available in law," and the court in the case of *Foster v. The Bank of England* fully adopted the reasoning in *Gade's case*, and decided that, as regarded the transferor, the transfer signed by him in the books was valid, before any acceptance signed by the transferee. All the judges expressed themselves strongly to that effect. They remarked that the legislature could never have intended that parties should lose the benefit of a transaction of this kind, if there

was not an acceptance formally underwritten, which death or many other accidents might render impossible. *Lord Denman* observed that the practice notoriously agreed with that view of the statute, and that they ought not to raise any doubts upon it. *Patteson, J.*, marked that the direction as to acceptance could only have referred to the rights of the transferee against the bank ; meaning, no doubt, that until he accepted he might decline to be treated by the bank as holder of the shares, and in any manner chargeable as such. He could not, he said, think it essential to the transferror parting with the stock, that the other party, wherever residing, even if in Russia, should sign an acceptance. Everything, he said, had been done there, which was necessary to the transfer, and he could not think that a transferror, having done all that is necessary for the purpose on his part, could pocket the price of the stock, and still say that he is the holder. *Williams, J.*, said he did not see how any doubt could be entertained, except by confounding the parties to the transaction ; for that whatever might be the rights of the transferee before acceptance, the transferror could not, after going through all the requisites of a transfer, assert that he is still the holder. *Wightman, J.*, puts the thing in this clear and concise manner—"It may be that the transaction is not complete, as between the transferee and the bank, till acceptance ; but as against the transferror it clearly is so, when the forms of a transfer have been gone through on his part."

Now, in the case before us, the transfer had been signed by the transferror in the bank books, and the transferee's name entered in the stock ledger as the holder ; and our statute on which this question arises contains no such express words as that "no other method of transferring the stock shall be good and available in law."

Of course the transfer in this case was liable to be impeached by creditors as colorable, but nothing of the kind was attempted, and we have no right to surmise it. It must, I conceive, follow that, if we take the decision in the case I have referred to as authority, the principle applies not only to the transferror, but to all persons claiming under him, whether under a sale made after the transfer, upon an execution against his goods, which is the present case, or by

a voluntary transfer made by him. If he could not sue the company for his dividends, because he can no longer hold himself out as owner, neither can any one be placed in a better situation than himself by a title derived through him.

It would be as repugnant to reason and justice, that, after, he had sold the shares and received the price, they should be sold as his to pay his debts, as it would be that he should be allowed to sell them a second time, because the acceptance had not been signed in the books. I do not see that upon any principle we could treat the sheriff's vendee as standing in a better situation than a person taken by a second transfer from the transferror himself.

I think that upon the facts proved the plaintiff was entitled to recover.

BURNS, J.—The British America Fire and Life Assurance Company is incorporated by statute 3 Wm. IV., ch. 19, amended by 6 Wm. IV., ch. 20. The shares were made assignable and transferable by the first act, and in the 5th section of the amending act a proviso in these words is contained, "Provided always that such assignment and transfer shall be entered in a book of the said company to be kept for that purpose, and shall be signed by the person or persons respectively making and accepting such assignments or transfers, their respective attorneys or agents." Under statutes 2 Wm. IV., ch. 6, and 12 Vic., ch. 23, the shares held by proprietors of this company, in common with other public companies, are liable to be sold upon execution.

In the case of *Foster v. The Bank of England* (8 Q. B. 869, 10 Jur, 565) it was held that a transferror, after the transfer entered in the books of the bank was once made, never could maintain action for dividends, although the transferee had never accepted the stock according to the provisions of the act of parliament. What was said there—that it might be another question how far as against the bank or the public the property in the stock vested in the transferee without compliance with the provisions—caused me at first to doubt whether in this case there had been an effectual transfer to avoid the operation of an execution against the person who

had made the transfer. In the case *Ex parte Lancaster Canal Company* (1 Dea. & ch. 411), a mortgage of certain shares of the company, executed by the owner, had been deposited with the officer of the company, but had not been registered according to the provisions of the company's charter. Lord Lyndhurst held, that because the provisions of the act of parliament had not been complied with there had been no effectual transfer, and that the shares still stood in the order and disposition of the bankrupt, who was the owner. The distinction between that case and the present is, that notwithstanding the mortgage, the mortgagor, so far as the books of the company disclosed, stood as the proprietor of the shares, and would be entitled to the dividends; and according to the facts of the case it seemed as if it were intended that the mortgagor should retain control over it for the purpose of receiving the dividends and voting upon it, subject to the mortgage. In the case before us, the transfer had been made upon the company's books, and the transferees had been recognized as the owners, and as it is clear the transferor could never have claimed the dividends, so, I apprehend, the company could never have resisted the claim of the transferees. No dividends appear to have been paid to the transferees, nor do we know, beyond the bringing of this action and the act of accepting the transfer in January, 1851, that they did anything evincing an intention to become the proprietors of the shares. Under those circumstances, and supposing nothing more to have been done, then, according to the cases of the *Midland Great Western Railway Company v. Gordon* (16 M. & W. 804), and *The Newry and Enniskillen Railway Company v. Edmunds* (2 Ex. 118), and other cases, the company could not have maintained any action for calls that might have been made. Whether such repudiation on the part of the transferee would have had the effect of revesting the stock in the transferor, or afford an argument for saying that notwithstanding the transfer or the registration of it, yet that it remained in abeyance, or was to be treated as conditional until acceptance evinced in some way, is not necessary to be determined in this case. Here we have the evidence of acceptance; and the only question is, whether

the execution creditor has acquired a right which prevents that acceptance from being carried back to the time of and attaching upon the act of transfer. According to Gade's case (2 Lea-C. C. 732), the shares in this instance would have vested in the personal representatives of the transferees, though they had not manifested an acceptance by writing. The provisions of the statute, it is clear from this authority, are not required to be strictly carried out in order to confer a right upon the transferee and those claiming under him, but he may be treated as the owner so far as the transferor and the company are concerned. Possibly the right of the transferee to vote at an election of directors and officers of the company might be disputed until he had formally accepted the shares as well as for want of his acceptance giving him a right to say he shall not be sued for calls; but that is a matter of mutual rights between the transferee and the company or other members of the joint association, and in these cases the provisions of the act of parliament may be made applicable. Possibly also the non-compliance as regards the transferee may be used as an argument that the transfer was colourable, and so be used in a case between the transferor and his creditors, and thus it may be a question in which the public in that sense may be concerned. In order, however, that such point should be determined, it must be made a question of fact for a jury to pronounce upon. No question has been raised in this case under the statute 13 Eliz. ch. 5, but it has been made a purely legal question, whether a transfer of shares vests the property in the transferee before his acceptance thereof in writing be signified. It must be so held as an abstract question, and upon the facts of this case, and that an execution creditor gains no right to sell the shares merely from the want of an acceptance in accordance with the terms of the act of parliament; but some other ingredient requires to be established in addition to that fact, to give him such right. Judgment should therefore be to enter a verdict for the plaintiff.

DRAPER, J., concurred.

Judgment for plaintiff.

ARMSTRONG V. AUSMAN.

Registration of chattel mortgages—Necessity for subscribing witness—Time of refileing—Statement of interest—12 Vic. ch. 74.

The statute 12 Vic. ch. 74 provides, that chattel mortgages under certain circumstances, shall be void as against creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith, unless the mortgage "or a true copy thereof, together with an affidavit of a witness thereto" of the due execution of the mortgage, or of the due execution of the original in case of a copy, shall be filed as directed by the act; and also that every mortgage or copy thereof so filed shall cease to be valid against such purchasers or mortgagees after the expiration of one year from the filing thereof, "unless within thirty days next preceding the expiration of the said term of one year a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed," shall be again filed.

Held, that it was not essential that the affidavit of execution should be of a subscribing witness; and that where the original had no subscribing witness, but in the copy filed the name of the person who made the affidavit was inserted as a witness, the variance was not material.—*Robinson, C. J.*, dissenting.

Held also, that where the first filing was on the 15th of May, 1852, a refileing on the 14th of May, 1853, was clearly in time.

Held also, that no affidavit is necessary to verify the statement of the mortgagee's interest required by the act.

This was an interpleader suit, to try whether certain goods seized by the sheriff of the United Counties of York, Ontario, and Peel, were at the time of the seizure the property of the plaintiff.

At the trial at Toronto, before *Richards, J.*, a verdict was rendered for the plaintiff, and 1s. damages, subject to the opinion of the court upon the evidence and facts, whether the plaintiff had a legal title to the goods.

It appeared that a judgment was obtained by the defendant against John Montgomery on the 11th of June, 1852, on a verdict rendered against him on the 11th of May, 1852, and execution issued thereon was returned *nulla bona* on the 13th of July, 1852. Another judgment was obtained by the defendant on the 5th of October, 1852, and execution issued on the 16th of November, 1852, and returned *nulla bona* on the 10th of January, 1853. On the 17th of May, 1853, an alias *fi. fa.* was taken out, upon which the sheriff seized. On the 15th of May, 1852, Montgomery executed a conditional bill of sale of the goods to the plaintiff, to secure him the payment of £134 16s. 5½d., on the 15th of May, 1853. There was no subscribing witness to this instrument. It was filed with the clerk of the county court on the same day, at forty minutes past one o'clock, p.m., with an affi-

davit of the bargainee, according to the statute, and also an affidavit of John Robert Jones, who swore that he was present and did see the bill of sale executed by Montgomery, and that he was a subscribing witness to the instrument. On the 14th of May, 1853, a copy of the bill of sale, with copies of the different affidavits, were refiled in the office of the clerk of the county court at ten minutes past two o'clock, p.m., accompanied by a statement that the principal sum of £134 16s. 5½d. was due.

Montgomery was examined as a witness and stated that all the debts were *bonâ fide* debts, and still due to the parties : that the plaintiff pressed him for security at the time of and before the bill of sale was executed. Jones the person who made the affidavit was examined, and proved that he was present and saw the bill of sale executed, but forgot to put his name to it as a witness, and immediately after it was executed made the affidavit.

Hagarty, Q.C., obtained a rule to deliver the postea to the plaintiff, in order that judgment might be entered for him.

John Duggan and Burns opposed the rule. They cited *Beaty v. Fowler*, 10 U. C. R. 382 ; *McMartin v. McDougall*, 10 U. C. R. 399 ; *Atcheson v. Everitt*, Cowp. 391, Ch. Arch. 130, 131 ; *Dean of York v. Middleburgh*, 2. Y. & J. 196 ; 12 Vic. ch. 10 sec. 5 sub-sec. 28.

The points relied upon by the defendant to invalidate the plaintiff's security, were :—

1st, That the person making the affidavit of the execution of the bill of sale must be a *subscribing* witness to the instrument.

2ndly, That an affidavit is required to be filed with the copy of the instrument when refiled with the statement, shewing the *bona fides* of the transaction, or that the amount is due.

3rdly, That the statement annexed to the copy refiled, which was in these words :

“ John Montgomery to Philip Armstrong, Dr.

“ To amount of principal money due on said mortgage to the said Philip Armstrong, the mortgagee in said mortgage named, to this date, May 14th, 1853, £134 16s. 5½d.

“(Signed)

“ JOHN MONTGOMERY,

“ PHILIP ARMSTRONG’

does not sufficiently comply with the provision of 12 Vic. ch. 74 sec. 3.

4thly, That the copy of the mortgage filed should be verified as a true copy, and in this instance it was not a true copy, for there were verbal inaccuracies; besides which the copy represented Jones to be a subscribing witness originally to the bill of sale, which was not the fact, as the original shewed.

5thly, That the copy should have been filed on 13th of May, to come within the provision of the law as to filing within thirty days next before the expiration of the year; that is to say, that the year from the first filing would expire on the 14th of May, and the expression *next before* excludes that day.

6thly, That the delivery of the goods mentioned in the instrument made it an absolute sale instead of a mortgage, and consequently the bargainee should have had a continued possession.

ROBINSON, C. J.—I see nothing that seems to raise a doubt in this case, except what arises from the circumstances of there being no subscribing witness to the chattel mortgage, and of the variance between the copy refiled and the agreement in that respect.

1st, There is the fact that there was no subscribing witness. If it was essential that there should be one, then for that cause this mortgage would not be good under the act, though no doubt if it were not for the statute it would be sufficient if the execution were legally proved, though not by any subscribing witness.

2ndly, If not illegal merely for the want of a subscribing witness, still there is this further exception taken, that in the first filing the execution was proved of a mortgage to which the deponent swore he was a subscribing witness, and that his signature *thereto subscribed was his*. This, it is argued, cannot be deemed to be proof of *this* mortgage, such as the statute requires, because to this mortgage there is no subscribing witness.

3rdly, Upon the refileing there was a paper filed as a copy

of this mortgage, which exhibits on the face of it the name of one Jones subscribed as an attesting witness ; and that, it is argued, demonstrates that this is not a copy of the same mortgage that had been filed the year before, since that had not the name of any person to it as a subscribing witness, and so the original mortgage does not appear to be re-registered.

I think there is much in these objections. The signatures of attesting witnesses have been held not to be part of the instrument, and therefore not necessary to be transcribed in giving over, but that has not been always so ruled. Longmore v. Rogers (Willes 290) is a decision to the contrary. Still, I think, it may be doubted whether it should be regarded as part of the instrument. Lord Coke, however, seems to have regarded it in that light (a). If it should not be treated as part of the instrument, then it might reasonably be contended that where the original had the name of a subscribing witness to it, and the copy omitted it, the omission would not make the latter less a copy ; but here it is the converse—the original is unattested, and yet the copy professes to be a copy of a deed which was attested. It has something in it which is additional to the original and would seem to shew it not to be a copy of the same instrument.

Besides, I think it the soundest construction to give to the statute 12 Vic. ch. 74, that the words “together with an affidavit of a *witness thereto*,” mean the affidavit of an attesting witness. The Registry Act has always received that construction. There seems no reason to think that the assignment to this plaintiff was not for an honest debt. There was nothing shewn to impeach it, though the fact of its being made just after the verdict was rendered in favor of this defendant Ausman has led him probably to suspect that the intention of the mortgagor was to prevent his recovering his debt.

For the reasons I have given, I do not think we should hold that the statute 12 Vic. ch. 74 has been sufficiently complied with in this case.

Our Registry Act 35 Geo. III. ch. 5, sec. 4, does not require a subscribing witness to a deed in stronger or other language

(a) See Co. Lit. 6 a, 1 Saund. 9 c, note c.

than is used in the act now in question. It only says that the memorial shall be executed in the presence of two witnesses, one whereof to be one of the *witnesses to the execution* of such deed (sections 4, 5, 13); and yet universally in practice this has been held to mean a subscribing witness, and without this I am persuaded no deed has been or would be received for registry.

The same may be said of the Registry Act 9 Vic. ch. 34, and our last Registry Act 16 Vic. ch. 187, sec. 6. It speaks only of the "witnesses to the execution of the deed," not using the words *subscribing* witness; and, as we have always understood subscribing witnesses to be intended when this language has been used with respect to deeds and mortgages of lands, I do not see why we should not equally consider that to have been intended in the statute for the registration of deeds and mortgages of chattels. I must say that I am persuaded the legislature meant it in the one case as much as the other.

There are many statutes requiring certain writings to be signed in the presence of two or more witnesses; as, for instance, an assignment of a bail-bond under 4 Anne. ch. 16, sec. 2, so also replevin bonds under 11 Geo. II. ch. 19, sec. 23. But these cases are hardly analogous, because the statutes there do not speak, as this statute does, of "witnesses to the deed;" and in *Phillips v. Barlow* (1 Bing. N. C. 433) the court held that if the sheriff executed the assignment in the presence of two witnesses, it was sufficient although the witnesses did not both attest it at the time by subscribing their names; but there the provision is that the sheriff shall make the assignment in the presence of two witnesses. Here the provision is, that the mortgage shall be void, unless the mortgage, together with an affidavit of a *witness thereto* of its due execution, shall be filed with the county clerk. I think this expression of "*witness thereto*"—or in other words "*witness to the mortgage*"—points if anything more clearly to a subscribing witness than the expression "*witness to the execution of such deed*," as used in the Registry Act, has, I think I may say, been universally understood to mean a *subscribing* witness to the deed; and, as the same

object is in view in both cases—namely registration upon proof by the witness—the construction which has universally prevailed in the one case ought to govern the other ; and I really think that the words “ witness to the mortgage ” import, in their natural sense and common acceptance, nothing less than a person whose name is on the mortgage as a witness to it. I believe where any person, either lawyer or layman, asks whether a person is a witness to any particular deed or note, or writing, he means to ask and is always understood to ask, whether his name appears on the writing as a witness, not merely whether he was in the room and saw it executed. I should have more confidence in the correctness of the opinion I have formed, if it were not that my brothers, as I understand, have both come to a different conclusion (*a*).

DRAPER, J.—I think the plaintiff must succeed. As to the objection of *time*, the statute 12 Vic. ch. 74, sec. 2, requires the clerk to file such mortgages, &c., “ and to endorse thereon the time of receiving the same ; and section 3 provides, that every such mortgage shall cease to be valid as against creditors of the mortgagor, &c., “ after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of the said term of one year a true copy of such mortgage together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by virtue thereof, shall be again filed in the office,” &c.

The year must commence either generally on the day of filing—*i. e.*, at the commencement of that day or at the hour of the particular day on which it is marked as received by the clerk. In this case, therefore, it would either commence at midnight, between the 14th and 15th of May, 1852, or at forty minutes past one p.m. on the 15th of May, 1852. In the one case the year would expire at midnight between the 14th and 15th of May, 1853, in the other at forty minutes past one p.m. on the 15th of May, 1853. In either case the year would not have expired at any time on the 14th of May,

(*a*) See the Imperial Act 53 Geo. III, ch. 141, sec. 2.

1853. Now the refiling is to be within thirty days next preceding the expiration, not *the day of* the expiration. In this case the thirty days are to be computed back from the time of the expiration. The reverse of such a case is *Robinson v. Waddington* (13 Q. B. 753). The only doubt can be, whether the phrase "*within thirty days next preceding* the expiration" excludes the twenty-four hours next before the actual hour and minute when it will expire; or, computing the day by its date, whether the day next before the day on which the expiration takes place is to be excluded. I do not perceive any ground for so determining.

Then, as to the fact that the original mortgage had not at the time of its execution a subscribing witness. In the first place at common law the instrument, like any ordinary deed would be valid and binding although there be no subscribing witness. Then the first statute does not in terms require a *subscribing* witness, but makes the mortgage void where it is not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged unless it or a true copy thereof, "together with the affidavit of a witness *thereto*" of the due execution, be filed in the office of the clerk of the county court, and unless within thirty days next before the expiration of a year from such filing, a copy, with a statement exhibiting the interest of the mortgagee be again filed in such office. It is observable that under the fourth section, although all has been done that the statute requires if at any time the mortgage comes in question it has to be proved in the ordinary manner; for the production of the instrument or copy filed, with the clerk's certificate thereon, is only evidence of the facts stated in the certificate, but certainly not of the execution of the instrument. The amending act makes no difference in reference to the witness, though it requires an affidavit from the mortgagee that the mortgagor is justly indebted to the mortgagee in the sum mentioned, and that it was executed in good faith, and for the express purpose of securing the payment of the money so justly due, and for the purpose of protecting the goods therein mentioned against the creditors of the mortgagor.

Now the object of registration appears to me primarily to be notice to protect subsequent purchasers, or persons dealing with the mortgagor, that they may have the means of ascertaining under and subject to what claims he holds the chattels and personal property in question. If the registration is effected, that notice is given; and it matters not for that purpose that the witness to the mortgage, on whose affidavit it is registered, should not have subscribed his name to the mortgage. That it would be practically more convenient that the witness should subscribe may be readily conceded, but that does not establish its necessity. There are cases that shew that an omission to register does not make void the instrument between the parties; but what the defendant urges is, that, notwithstanding it is in fact registered, the mortgage shall be deemed insufficiently executed, at least for the purpose of registry, and so void, for want of a subscribing witness. I do not see that for the attaining the true object of the statute this is necessary, and therefore am against the objection, which, if it prevailed, would defeat a registered security, the *bona fides* of which is not questioned.

BURNS, J.—With respect to the first objection, the expression used in the first section of the act referred to, requiring mortgages to be filed is, that in filing the instrument, or a true copy thereof, it shall be done *together with an affidavit of a witness thereto*. I do not think this expression necessarily imports that the witness must be an attesting or subscribing witness, which are synonymous terms. The old registry act (and the recent acts preserve the same expressions) states that the memorial shall be attested by two witnesses, one whereof to be one of the witnesses to the execution of such deed. I am not aware that any question has ever been made, whether a deed which had no attesting or subscribing witness could be registered upon a memorial with two attesting witnesses, and describing the persons as being present at the execution of the deed; but, if any such question were made, I apprehend it would be held that for the purpose of registry a deed must have an attesting or subscribing witness—because the word *attested*, as first applied to the memorial, would, I think, be

held to over-ride the whole sentence, and be applicable also to the deed. Independent of the registry, and for the purpose of establishing deeds in a court of justice, we know that the law is and has been that the execution of a deed may be proved by a person who was present and saw it done, though he did not subscribe his name as an attesting or subscribing witness. If there be an attesting witness, he must be the witness to prove the execution, or, if it is sought to be otherwise proved, his absence must be satisfactorily accounted for. No doubt it is proper that the person who is called to witness the execution of an instrument should subscribe his name, and not leave the matter to his recollection; and every decision to enforce that he should do so, consistent with the law, is a wholesome position for the interests of the community, though at times some individuals may suffer by reason of such strictness. The question must be in this case, whether the legislature meant that the witness who made the affidavit in order to register the instrument should also attest it. In construing acts of parliament of this description, which add to or require something to be done which the law previously did not require, I understand the rule to be, if the obvious meaning of the word used be such as to make an alteration in the law or addition thereto, then an alteration or the thing added must be supposed to have been intended; or if it be necessary to carry out the provisions of an act, that it must be inevitably inferred that an alteration or addition was intended, then it will be understood that the previous law has been altered or added to by implication. In other cases, the act of parliament will be construed with the existing law so as to make the one consistent with the other, leaving it to the legislature to say if they intended that it shall be otherwise. In this case the witness has sworn that he was present and saw the instrument executed; and, in the legal definition of the expression contained in the act, I think he was a *witness thereto*. That affidavit accompanying the copy of the instrument under which the plaintiff claims, would give notice to any one inquiring by whom the claimant intended to prove it, as well as if he had subscribed his name to the original.

There is nothing in the second and third objections. The

statute does not require any affidavit to be filed, either upon refiling the mortgage security, or to prove the correctness of the statement of the mortgagee's interest in the property. In this case it would be useless to require an affidavit beyond the first affidavit of the mortgagee, because the sum secured by the mortgage was not due at the time of the refiling; and therefore, unless the mortgagor had discharged it in the whole—in which case there would be required no refiling—or discharged it in part when the mortgagor would not be bound to do so, an additional affidavit would give no information to persons searching the office. The same observation will apply to any affidavit which would accompany the statement. The legislature has not required an affidavit, however, and it is not for us to say there should be one.

With regard to the fourth objection, there is nothing in the statute requiring the copy on refiling to be verified as a true copy. The inaccuracies complained of proving the copy to be otherwise than a true copy, are the inserting the letter *t* in the name of Montgomery, when it is spelled without the *t* in the original instrument—changing *him* into *he*, and *them* into *they*—inserting the word *his* when it is not in the original, and leaving out the word *the* when it should be contained in the copy. All these errors are manifestly clerical; and the question is whether the legislature could have intended when the expression was used, a *true copy of such mortgage* should be filed, if an error in transcribing the instrument were made of the nature complained of, that the security should be invalidated. This of course must depend upon the meaning to be affixed to the words *true copy*. Here we must bring to our aid the meaning used in the common acceptation, unless there be something to show that it was intended otherwise. It is always understood that words *idem sonantia* will be sufficient, or that in transcribing some different words may be used or others left out, provided the sense or meaning is not altered, and then the instrument itself is not vitiated; and if the instrument itself be good, I do not see but the same rule will prevail with the copy, and that in common parlance such variations do not prevent our saying it is a true copy. The most formidable objection on this point is that

the copy shews the name of the witness to it as if he were really the subscribing witness to the original, when in truth no name of a subscribing witness is attached to the original. It may be said that this shews that another instrument must have been intended to be copied. In this case it is not pretended there was any but the one security from Montgomery to the plaintiff, and so there is no reason for supposing that any one could be misled by what was done; but yet I think the defendant is entitled to a decision as to the legal consequences, and that it should not be rested upon merely equitable considerations. The question therefore is, whether adding the name of a person as a witness, when in truth there was not to the original the name of any witness, is a material addition calculated to deceive. I do not think it is, for a refiling of a security must be done in consequence of a security having previously existed, and been registered and filed, and the one is necessarily by its very terms a continuation of the other; and therefore, in searching or looking at the last, it shews that the security had existed before. It does not appear to me that the addition of the name of a witness renders it less a copy of the other, and I do not think the addition vitiates. In giving oyer of a deed, no doubt then a copy means a correct copy of the attestation with the names of the witnesses, but the reason for this is thus given by Sergeant Stephens (Stephens on Pleading, 5th Ed. 73), "when the profert was actually made *in open court* the demand of oyer, and the oyer given upon it, took place in the same manner; and the course was, that on demand by one of the pleaders the deed was read aloud by the pleader on the other side. By the present practice the attorney for the party by whom it is demanded, before he answers the pleading in which the profert is made, sends a note to the attorney on the other side, containing a demand of oyer; on which the latter is bound to carry to him the deed and deliver to him a copy of it, if required, at the expense of the party demanding; and this is considered as oyer, or an actual reading of the deed in court."

With regard to the time of refiling the security, the expression used in the act is, that it shall be refiled *within*

thirty days next preceding the expiration of the said term of one year. If the expression had been next preceding the *day* of the expiration, there might have been some room for the defendant's argument, because it might be said that day would be excluded; but upon the expression used we have merely to ascertain when the expiration of the term of one year would take place. The first filing was upon the 15th of May, consequently the year expired on the 14th of May succeeding, at the latest moment of the day. That being the expiration of the term of one year, then it must be that any time of that day before the term expired is as much within thirty days next preceding the expiration of the year as if done on the 13th day of the month.

There is nothing in the last objection. The delivery of the goods cannot make the instrument speak contrary to its language, and it is clearly conditional, and to be void on payment of the money.

I think the *postea* should be delivered to the plaintiff.

Judgment for plaintiff—ROBINSON, C. J., dissenting.

CUSICK V. EDWARD McRAE AND RENSELLAER McRAE.

16 Vic. ch 180 not retrospective—Whether defendants acted as magistrates, a question for the jury.

Held, that the statute 16 Vic. ch. 180 is not retrospective, so as to make the notice of action required by it applicable to causes of action which have accrued before the passing of the act, or to compel the party injured to sue in case and not in trespass.

Held, also, that in this case the evidence fully warranted a finding that the defendants were not acting or intending to act as peace officers, but as interested parties; and that this was a question properly left to the jury to determine.

The declaration contained one count, for trespass and false imprisonment. The two defendants joined in pleading not guilty "by statute." The case was tried before *Drupe*, J., at Perth, in September, 1853.

It appeared that the plaintiff was taken into custody by the defendant Rensellaer McRae, acting under the verbal directions of the other defendant, who was a justice of the peace. The plaintiff resisted, but was overpowered, and put into a single-horse sleigh, and brought by the defendants

from the place where he was arrested to the house of the defendants' father, a distance of three miles, where a constable was sent for, and came; and then the defendant Rensellaer, the plaintiff, one Daniel Knapp, and the constable, went on in the sleigh to Merrickville, about a mile further, where the constable took charge of the plaintiff, and had him in custody until about nine or ten in the evening, when he was discharged. The constable stated that another magistrate requested him to go to the defendant Edward McRae to take the plaintiff into custody; that he went accordingly, and by Edward McRae's verbal directions went to another place, where he found the plaintiff, and went with him to Merrickville as stated.

The reason assigned for plaintiff's arrest was, that a horse belonging to the father of the two defendants, and which Rensellaer McRae was at the time in charge of, had been killed on that day in Merrickville by the plaintiff's driving against it with a double sleigh, the tongue of which struck the horse in the side. It was sworn that the plaintiff was intoxicated at the time, and not capable of managing his horses. It appeared that McRae's horses were standing in the road when the plaintiff drove against them, which was between one and two in the afternoon; that the plaintiff drove on without stopping, and that the two defendants followed, and arrested the plaintiff at a distance of about four miles from where the accident occurred, within ten minutes after he got there. It was sworn that when the plaintiff was arrested, Edward McRae said the horse was killed accidentally.

After the plaintiff was brought as a prisoner to Merrickville, Edward McRae came there, and the plaintiff's father also came; and after some discussion, and some intimations by Rensellaer McRae of the probability of serious consequences to the plaintiff if the matter was not settled—as that he might possibly be sent to the penitentiary—the plaintiff offered to give a horse of his own in lieu of the one killed, saying if they would not take that they might send him to jail; and then his father interfered, and an arbitration took place, the arbitrators being named by the

plaintiff's father and the defendants; and on their award the plaintiff's father gave his promissory note for 21*l.* 5*s.*, payable to the defendants' father, who was not present; and then the plaintiff was set at liberty.

Both defendants were served with notice of action.

It was objected that under the statute 16 Vic. ch. 180, the action should have been case and not trespass, as that act came into force on the 1st of July, 1853, and the writ was not sued out until August, though the notice was served on the 18th of June, and the trespass committed on the 16th of March, 1853; also that the notice was insufficient, under the 8th section of the statute, as the name of the plaintiff and his place of residence were not indorsed on the notice proved.

Leave was reserved to the defendants to move to enter a nonsuit on these objections, and after some evidence for the defence the case went to the jury, who found a verdict for the plaintiff, and one shilling damages.

Richards obtained a rule *nisi* to enter a nonsuit on the leave reserved. He cited *White v. Clark*, 11 U. C. R. 137; *Leary v. Patrick et al.* 15 Q. B. 266; *Horn v. Thornborough*, 18 L. J. (Ex.) 349; *Barton v. Bricknell*, 20 L. J. (M. C.) 1; *Lock v. Ashton*, 12 Q. B. 871.

Phillpotts shewed cause, and cited *Parrington v. Moore*, 2 Ex. 223.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the late statute 16 Vic. ch. 180 is not retrospective in its provisions, so as to make the notice of action thereby required to be given applicable to causes of action which had accrued before the passing of that act, or to compel the party injured to sue in case and not in trespass; and whether the conduct of the defendants was to be considered with a view to the provisions of that act or of the previously existing law, it was properly, we think, a question for the jury to consider, under the circumstances, whether the defendants could be taken to be acting or intending to act under the provisions of the law for punishing malicious trespasses, or were proceeding in rather a high-handed way to coerce the plaintiff to make satisfaction for the wrong he had committed, not maliciously, but by his reckless negligence, and

not such satisfaction as the statute contemplated or could afford, but compensation for the value of the horse killed such as could only be obtained through a civil action. The intimation that the plaintiff might be sent to the penitentiary if he did not agree to compound, is quite inconsistent with the supposition that the parties imagined they were proceeding under the Summary Punishment Act, which only authorizes a fine to the amount of 5*l.*; and, seeing how the matter terminated, it was fairly a question for the jury to consider in what spirit, and for what purpose, and with what views, the defendants acted as they did.

They came to the right conclusion, we think, in determining that neither of them acted in any public capacity as peace officers or magistrates, but as interested parties. Nothing that was done in the matter could be fairly considered as done with a view to the summary conviction of the plaintiff under the provisions respecting petty trespasses of a malicious character. The defendants, doubtless, either adopted the course they did in the hope of enforcing a compromise by obtaining for their father the value of the horse, or possibly under the idea that by the general criminal law of the land such misconduct as the plaintiff had been guilty of could be severely punished.

It is seldom that a matter of this kind terminates so equitably for all parties as this happens to have done. The plaintiff must have been shamefully intoxicated, and unfit to drive upon the highway, and it was right that the owner of the horse killed by him should receive from him its full value, as he has done. On the other hand, the defendants proceeded in an illegal manner, and indiscreetly; and it is well that they should be made sensible of that, as they will be by the costs, which they will have to pay; while at the same time the jury, judging reasonably that under the circumstances the plaintiff could with an ill grace claim damages for being deprived of his liberty for a short time, while he was scarcely sober enough to know where he was, and when he had been acting so very improperly, properly gave a shilling damages as the utmost to which they thought him entitled. It is fortunate that such an issue of the matter can be upheld.

Rule discharged.

CULVER V. MACKLEM AND DINGMAN.

Trespass—Pleading—Tenants in common of chattels.

TRESPASS.—First count, for breaking and entering defendant's close, and taking away wheat; second count, for taking away wheat.

Pleas, to each count leave and license; and to the second count, that defendant and plaintiff were owners of the wheat in common, and that defendant of his own right committed the trespass.

It was admitted at the trial that the defendant was entitled to half the wheat as tenant in common with the plaintiff, and that the trespass complained of was the entering on the premises and taking away the other half, to which he had no claim.

Held, that on these facts and pleadings the action must fail; for as to the pleas of leave and license, the entry was lawful, and the plaintiff should have new assigned if he relied on the excess; and as to the remaining plea, one tenant in common of a chattel cannot maintain trespass against another for merely taking his chattel into his sole possession.

The plaintiff declared in trespass, in the first count, for breaking and entering his close on the 20th of August, 1853, and on divers other days, &c., and for cutting down the wheat and corn of the plaintiff growing thereon, and converting the same to the defendants' use.

In the second count the plaintiff complained that the defendants, on the 20th of August, 1853, and on other days and times, &c., took and carried away one hundred loads of wheat, one hundred loads of corn, &c., of the plaintiff, and converted the same to their own use.

The defendants pleaded, first, not guilty, to the whole.

Secondly, to first count, plaintiff not possessed of the close in which, &c.

Thirdly, to the first count, leave and license.

Fourth and fifth pleas, to second count, similar to the second and third to the first count.

Sixthly, to the second count, that the defendant Dingman and the plaintiff were owners of the goods in common, and that Dingman of his own right, and Macklem by his command, at the said times when, &c., committed the said trespass to the goods.

The plaintiff replied *de injuriâ* to the last plea.

At the trial, at Simcoe, before *McLean, J.*, the plaintiff's counsel stated in his opening that Dingman had gone upon the land as purchaser from the plaintiff; and being unable to make his payments, it was agreed between him and the plaintiff that he should re-assign his interest to the plaintiff who should give up to him the promissory notes which had

been given for the purchase money: that the land was accordingly re-assigned on the 8th of January, 1853, by an instrument under seal, and the notes given up; and upon the same instrument there was written a memorandum, signed by the parties, that Dingman should be at liberty to enter upon the lands for the purpose of cutting the wheat then growing on a portion thereof; and that after cutting and putting the wheat into shock, when the same should be fit for harvesting, Dingman might remove and take for his own use one half of the said wheat so put up into shock, and that the other half should be the property of the plaintiff.

The plaintiff's counsel stated that the defendant Dingman did cut the wheat, and afterwards he and the other defendant entered and took the whole of it away; and that the trespass complained of was the entering upon the premises and carrying away the half of the wheat to which Dingman had no title.

The learned judge held that a justification being pleaded under leave and license, and the plaintiff being at liberty to prove only one act of trespass before the day named, which must be covered by the justification pleaded, and there being no new assignment, the plaintiff must fail.

A nonsuit was accepted, with liberty to move against it.

Van Norman obtained a rule *nisi* to set aside the nonsuit. He cited *Bowen v. Jenkin*, 6 A. & E. 911.

McMichael shewed cause, and cited *Barnes v. Hunt*, 11 East 451; *Mayhew et al. v. Herrick*, 7 C. B. 229.

ROBINSON, C. J., delivered the judgment of the Court.

We are of opinion that as the case was admitted to be by the plaintiff, he could not sustain this action. It is clear that the defendant Dingman, having a right by his agreement with the plaintiff to enter on the land and cut all the crop of wheat which he had sown, and then to take one half to his own use, as it stood in the field in shock, this arrangement made him tenant in common with the plaintiff of all the wheat, until it was divided; and one tenant in common of a chattel cannot bring trespass against another for merely taking the chattel into his sole possession, for the one has as good a right to the possession of every part as the other has.

We do not find that the right was pressed at the trial to have a verdict entered in point of form on any one or more of the issues, in order to give the plaintiff the cost of such issues ; and we think, upon the action generally, the defendants were entitled to succeed. As to the issues on the pleas of license to each count, under the facts as stated by the plaintiff's counsel in his opening, the defendants were entitled to succeed on that issue in respect to the first count where the gist of the action is the breaking and entering the close ; because nothing is said in the plea, which is an ordinary plea of leave and license, nor was anything proved of a stipulation about a previous division by consent ; but the statement was, that the defendant Dingman, when the wheat was cut and in shock, was to be allowed to go and take half. Only an entry for removing the wheat was spoken of, and that was lawful. If the privilege was abused, and by reason of the excess the defendants would become trespassers, such excess should have been replied.

The case of *Barnes v. Hunt*, (11 East 451) is distinguishable from this case, for there divers entries were alleged, and a license pleaded as to all of them, and it was proved on the trial that some of the entries were by permission, but others not ; and as the defendant had undertaken to prove license for all his entries, and failed as to some, he was held entitled to recover in respect to such entries as were without license. The plaintiff here relies on the fact of the defendants having taken away with them more wheat than they ought to have done, as making them trespassers in entering. But, however it might be on the pleas of license as to either or both of the counts, there is still the sixth plea to the second count, which charges the taking of the wheat, and that relies on the defence that the plaintiff and the defendant Dingman owned the wheat in common, and so one could not be a trespasser in taking any part from the other. The statement of facts made at the trial supported that defence, and answered all that was injurious in the defendant's conduct. And as to the plea of leave and license, if we compare this case with that of *Bowen v. Jenkin* (6 A. & E. 911), cited in the argument, we should not be safe we think, in applying the authority of *Barnes v. Hunt* to the

present case; for here, as in *Bowen v. Jenkin*, the defendants in their pleas aver that the entry and the taking the wheat which they justify are the same injuries of which the plaintiff complained, and the plaintiff, by replying *de injuriâ*, admits, as was the case in *Bowen v. Jenkin*, that the alleged trespasses were the same acts, but denies that the defendants had his leave to enter and take the wheat, to which wheat the defendants apply their defence. It is not like a case of several distinct trespasses for which license is pleaded. The plaintiff has on the trial admitted an entry and taking away of the wheat, to which the justification would apply, and, not having new assigned, must, as we think, fail; for the plaintiff, by replying *de injuriâ* to the sixth plea, admits the defendants' averment that the goods to which they apply their justification are the same for which the action is brought, but denies that there was any tenancy in common.

Rule discharged.

THE RAMSAY WOOLLEN CLOTH MANUFACTURING COMPANY
V. THE MUTUAL FIRE INSURANCE COMPANY OF
THE DISTRICT OF JOHNSTOWN.

Mutual fire insurance companies—Effect of double insurance on part of the property—Pleading—6 Wm. IV. ch. 18, sec. 22.

One of the conditions of a policy granted by a mutual insurance company was "that in case insurance shall subsist or be effected on the premises or property insured by the company in any other office, or from, by, or with any other person or persons, during the continuance of such insurance, the policy granted thereon by the company shall be void, unless such double insurance subsist with the consent of the directors, signified by endorsement on the back of the policy, signed by the president and secretary."

It appeared by the pleadings that three separate sums were insured—on a building, on the machinery, and on the stock in it; and a second insurance, without the consent of the company, was effected on the building and machinery.

Held, that by the terms of the condition, and of the statute under which these companies are incorporated, the policy was altogether avoided, and not merely as to the property so doubly insured.

Held, also, that it was immaterial that such second insurance was with a foreign company, and therefore not capable of being enforced here, for the condition intends an insurance in fact.

Quære, whether it would make any difference if the properties were wholly unconnected, so that a fire in one could not possibly endanger the other. A plea merely alleging that the property was insured in another office, is bad; the particulars of the alleged insurance must be stated.

This case brought up a question on the effect of a condition in the policy sued on, and granted by a mutual insurance company established under the statutes of this Province, 6

Wm. IV. ch. 18, and 4 & 5 Vic. ch. 64, which provided that "in case insurance shall subsist or be effected on the premises or property insured by the company in any other office, or from, by or with any other person or persons, during the continuance of such assurance, *the policy granted thereon by this company shall be void*, unless such double insurance subsist with the consent of the directors, signified by indorsement on the back of the policy, signed by the president and secretary."

There was also a condition in the policy, "that all fraud, or false swearing shall create a forfeiture of all claims on the company, and shall be a full bar of all claims against it on the policy."

The property insured was as follows : 25*l.* upon a wooden building described in the policy ; 75*l.* on the machinery used in working a factory within the same building ; and 400*l.* on the stock in the same building, consisting of wool, cloth, and coarse fabrics in the course of manufacture. The whole was insured for a year from the 13th of March, 1852, it being expressed that the sums insured on each description should not exceed two-thirds of the value thereof at the time of any loss occurring.

The plaintiffs claimed the full sum of 500*l.* insured, alleging a total loss by fire ; and in their declaration they denied, as is usual, that anything had taken place, or that they had done anything, which could invalidate the policy, or affect their right to recover ; alleging, among other things, that the said premises, goods, chattels, stock and other effects in the policy mentioned, at the time of making the policy, were not, nor at any time since had been, insured in any other office, or by or with any other person.

The defendants pleaded, as their seventh plea, that part of the property in the policy mentioned and insured thereby viz., the buildings and the machinery mentioned in the deed poll (*i. e.* the policy) and insured thereby, was before, and until, and at, and after the time when the property in the declaration mentioned was destroyed by fire, as in the declaration alleged, *insured in another office* ; and of this they put themselves upon the country.

In the ninth plea the defendants stated the particulars of the other subsisting insurance, setting forth when, and with whom, and to what amount, and on what property such insurance had been effected. The statement was, that the plaintiffs had insured the said building for 275*l.*, and the said machinery for 225*l.* (both sums being laid under a *scilicet*), in the United States Mutual Insurance Company; and that such insurance was still subsisting until, and at, and after the time when the said property in the declaration mentioned was destroyed by fire, as therein set forth; averring also that such other insurance was subsisting without the consent of these defendants.

The plaintiffs demurred to each of these pleas. The causes of demurrer sufficiently appear in the judgments.

There was also a demurrer to the rejoinder to the plaintiffs' replication to the tenth plea, and a demurrer to the replication to the eleventh plea, which turned upon this question—whether it is any answer to the defence set up, of a double insurance not communicated, or at least not consented to, to reply that such double insurance was illegal and invalid, because effected with a foreign insurance company, which could not by law extend its transactions to this province; and so that, this being an ineffectual insurance, the property was not in fact doubly insured at the time of the fire. That point was met by the defendants, in the issue in law formed upon the tenth plea, by the assertion that the first insurance was made in the foreign country and was valid there, and binding upon the foreign company.

Hagarty, Q. C., for the plaintiffs.—The seventh plea is too vague as to the allegation of the second insurance. The particulars of it were necessary to be set out, as they have been in the ninth plea.

As to the substantial question, it is difficult to find any authorities on the point, but in reason a double insurance on the part of the property should not vitiate the policy entirely, but only as to the property on which the second insurance is made. The condition is that "the policy granted *thereon*" shall be void. The word "*thereon*" will fairly bear the meaning contended for, and in the absence of fraud the

defendants are entitled to have the condition construed as strongly as possible in their favour. The case of *Penniall v. Harborne*, 11 Q. B. 368, is somewhat analogous, but not very much in point on either side. Suppose three houses, one in Toronto, one in Hamilton, and one in London, all insured in a Toronto company, and suppose a further insurance effected on the house in Hamilton, would the omission to communicate this to the company vitiate the insurance on the other two houses? Besides this, there is the further point, that the second insurance was with a foreign company, and therefore void.—*Genesee Mutual Insurance Co. v. Westman*, 8 U. C. R. 487. It was a nullity, and could therefore be no breach of the condition.

Richards, contra.—The seventh plea is sufficient. The plaintiffs in their declaration allege that there was no insurance in any other office. That could only be met by a direct traverse—viz., that there was such an insurance. The pleadings were then closed, and there was no necessity to go on and say in what office it was.

As to the effect of a second insurance without notice, the statute clearly means that the whole policy shall be avoided. [DRAPER, J.—Suppose two houses, one with goods in it, one with machinery; that a double insurance is effected on the house with the goods, and that the other is burnt; then could there be no recovery for the house burnt, because of the second insurance on the other?] No; that is the effect of the statute. [ROBINSON, C. J.—To put the case most strongly, we must suppose the properties so situated as that a fire in one could not possibly affect the others.] The policy is one, and the condition is not that the insurance on any part shall be void, but that the policy shall be void. [DRAPER, J.—Then suppose a building insured, and that the goods in it are afterwards insured by a separate policy, and then doubly insured, and burnt; you must admit, according to your argument that the policy on the building would not be vitiated, because it is separate.] Yes. [DRAPER, J.—And yet the temptation to burn the building would be increased.] The defendants have a right to refuse to divide the liability, and to say that they will be liable for all or none. Suppose a house worth 2000*l.*, and goods in it worth

1000*l.*; that an insurance is effected on the goods for 1000*l.* and on the house for 150*l.*; if the insured may afterwards go and effect another insurance on the house to near its full value, then the company would lose the guarantee which they had, that on account of the great value of the house the insurer would be careful of the goods, as in a fire both would go together.

It is immaterial that the second policy was with a foreign company. It could be enforced in the United States; and at all events the true question is as to the effect it would have on the conduct of the insured. He might not know it to be invalid, and if he did he might rely on its being paid without difficulty. The company have a right to insist that no other policy shall be effected which could possibly benefit the insured.

ROBINSON, C. J.—I am of opinion that the seventh plea is bad, as being too general and vague; not stating when, where, or in what office the other alleged insurance had been effected. It is no answer to the exception, that the plea is a simple denial of the alleged observance of that particular condition by the plaintiffs; that it concludes to the country; and that we are to look only to the issue as joined by the special traverse. Upon the same principle, the nonperformance of any condition precedent might be set up in the same general terms, without pointing out any particular in which the plaintiffs had failed. I think on the demurrer to the seventh plea the plaintiffs should have judgment.

The ninth plea brings up the substantial question in this case.

The exception taken to this plea is one of substance only—viz., that it is no answer to the whole action, but is at most a defence in respect to such of the amount claimed as applies to the two portions of the property which were doubly insured; that is, the house and the machinery within it; leaving the plaintiffs' claim to recover for the stock, valued at 400*l.*, unanswered.

The learned counsel for the plaintiffs could not cite any authority, for giving so limited an effect to the breach of the

condition ; and I think, upon legal principles, and in reason, the breach of this condition, when it occurs, avoids the whole policy. It is true that the words of this condition are, that in case of such double insurance *on the premises* or property insured without notice, &c., the policy granted *thereon* by the company shall be void. It may seem that a strict grammatical construction would seem to compel us also to hold that to enable this condition to operate at all, the double insurance must be not merely on a part of the property, but on the property insured—that is, on the whole property. This could never have been meant ; neither do I think could the construction contended for, have been in the contemplation of the legislature.

But it does not rest wholly on the condition expressed in the policy. The statute itself (6 Wm. IV. ch. 18, sec. 22), makes it the law of the land, that if insurance on any house or building shall subsist in any company of this description and in any other office at the same time, the insurance made by the company *shall be deemed and become void*, unless such double insurance subsist with the consent of the directors. Now here the building which contained all the other property insured by these defendants was doubly insured, and the consequence is that the *insurance should be deemed void*—that is, literally, the whole insurance ; and it is indeed in accordance with maxims of law that such should be the effect where it is an act of parliament that makes the thing void, for in general the rule in such cases is, that the act does not merely avoid the bad part and allow the rest to stand, but makes the whole void. If this be the correct view to take of the clause in the act, a corresponding effect should be given to the condition ; for both parties must be supposed to be contracting with a view to the powers and liabilities that can be exercised or may arise under the statute, by which they are both alike protected and bound. And in reason a breach of this condition should avoid the whole policy, independently of the principle (which is most strictly applied) that the breach of any warranty in a policy absolutely voids it, whether such breach had any effect or not in increasing the risk or producing the loss. The reason of this particular provision is obvious.

When a person has his property insured in two offices, he may easily stand insured in much more than its value; and the hope that the fact might not be discovered—especially where the offices are in different countries—might supply a dishonest mind with a motive for setting fire to his own property. I dare say in this case nothing of the kind was thought of, but we know that in all countries many frauds are practised upon insurance companies, and many more attempted; and as a necessary protection to them, the law has deemed it wise, as well as just, to exact the utmost good faith, the most exact observance of conditions in all such contracts. In this case, although it is true that the stock was not doubly insured, yet, so far as regards the consideration which must have suggested this condition in the policy, that affords no good reason why the double insurance should not avoid the policy as well in regard to that property as the other, for it was all in the same wooden building, which was doubly insured, and which contained all the machinery on which a double insurance had been effected. If by reason of such double insurance on the building and machinery a motive existed for fraudulent setting fire to the building, we must remember that the danger of such a fraud would materially affect the position of the company as regarded the stock, which might or might not be saved from destruction of the house were set fire to. If it would make any difference that the premises insured were wholly unconnected, so that any casualty affecting one could not endanger the other, yet this clearly is not such a case, and we cannot decide the legal question according to any estimate that we might form of the degree of danger, or the force of the motive depending upon the relative values and the amount insured upon the different properties.

Besides, the peculiar nature of these mutual insurance companies, the notes which the persons insured have to give, the interest they acquire in the company, and the arrangements to be made for paying losses, all depending on the amount of the policy, seem to supply additional reasons for holding the policy altogether avoided by the breach of the conditions in question, rather than that it should, like an award in such cases, be upheld as to part and avoided for the

remainder. That effect would seem to me to be in accordance with the literal import of the 22nd clause of the statute, and not irreconcilable with the words of the condition, besides being consistent with those principles which are in general strictly maintained in regard to warranties and conditions in such cases, and with those maxims of the common law which usually represent fraud as vitiating a contract wholly, and not merely in that part regarding which any misrepresentation or concealment may have been practised. For these reasons, I think the ninth plea good, as a defence to any claim under the policy.

It was truly remarked by the learned counsel in argument, that it seems surprising how meager English text books are upon the subject of fire insurance, and how few cases are to be met with in the reports upon questions arising out of such policies. I believe that to be owing to the fact that English insurance companies have, from the first, felt it politic as well as just to raise as few difficulties as possible in adjusting any claims for losses, where they are satisfied that all has been conducted in good faith: and where they have not been in fact misled, they meet their liabilities promptly, and are reluctant to take advantage of technical objections. And I imagine, when substantial questions either of law or fact do arise, as many must, they are generally settled out of court by reference to persons who from long experience have become thoroughly conversant in such subjects, and possess a traditionary knowledge of rules and usages, which disposes parties to acquiesce in their decisions, rather than to appear frequently in courts as litigants.

But, though we have in general little to guide us in English adjudged cases upon fire insurance, it appears to me that the question upon this ninth plea, is in fact decided by such cases as have been determined upon marine insurances, which have furnished more subjects for discussion in the courts.

As to the other question to be decided, I think it is immaterial whether the insurance alleged to have been made in the United States insurance company was strictly a legal binding contract or not. It was an insurance in fact made. The policy existed. The foreign company might or might

not repudiate it. If it were worth their while to carry on a business in this country, it would not do for them to deny their obligation to fulfil any of their engagements; and if the persons insured could entertain any hope of their paying voluntarily in case of a loss, the inducement to fraudulent conduct would exist. I think the replications to the tenth and eleventh pleas, which set up the alleged invalidity of the foreign insurance, are insufficient, and the pleas good on the same ground as the ninth plea; and that judgment upon those two demurrers, as well as upon that to the ninth plea, must be for the defendants, and for the plaintiffs on the demurrer to the seventh plea.

BURNS, J.—I have come to the conclusion that the seventh plea is not sufficient. It is true the plea traverses an allegation in the declaration; but, notwithstanding that, the declaration and plea taken together do not form a *certain* issue upon which any *certain* and definite evidence can be applied. It is too general. The allegation in the declaration is a negative averment; that is, that the premises were not insured in any other office. No evidence would or could be adduced on the part of the plaintiffs in respect of that allegation, until the position be attacked by the defendants. Can the defendants, then, attack that allegation by denying the truth of it, and so under that form of issue give any evidence they are able to produce with respect to other insurances; or should they not affirmatively shew on their part what they intend to prove as having the effect of avoiding the policy? I apprehend they should do the latter, and also aver, in order to make the defence perfect, that they had no notice of the subsequent insurance, and so give the plaintiff an opportunity of asserting that notice had been given. The mere fact of a second insurance does not of itself avoid the policy, but the destruction of the policy depends upon the fact whether it existed without notice. The issue, as tendered by this plea, is simply whether the second insurance did or did not exist, a matter which would be no defence if it existed with the assent of the defendants.

The main question between the parties arises upon the

ninth plea—whether a double insurance on part only of the property insured avoids the whole policy, or whether the plaintiff can recover the insurance effected upon the goods. What effect might be given if there were several properties included in one policy, upon which there were several and separate sums taken, and at the same time apparently separate and distinct risks, it is not necessary to say. In the present case, the risk of the goods insured is not a separate risk from the building. It is true a separate sum is taken upon the goods, but then the goods are only insured while they remain in the building. When once removed from the building, unless the removal were caused by a fire to the building, and which endangered the goods or caused the removal, the insurance would cease. According to the policy the goods could not be severed from the building without the risk on them ceasing, but while they remained in the building the goods and building were all one risk. It is worthy of consideration that this company is upon the mutual principle, and that the consideration for the insurance is the note of the plaintiff; and whether any apportionment of the note can be made, if there could be an apportionment of the sums to be recovered from the company, might be a question. The 13th condition indorsed on the policy, corresponds with the 22nd section of the statute, 6 Wm. IV. ch. 18; and that means, I think, that if an insurance exist or be effected upon the risk which the defendants have agreed to indemnify the plaintiff against, the policy granted thereon—that is, the risk—shall be void, if not assented to by the defendants. Various descriptions of property may constitute but one risk, and I take that to be the case in this policy. The dividing of the sums taken on all into separate sums spread over the different portions of the property, is for the mutual benefit of the insurer and insured, but the integrity of the insurance as one risk remains. Judgment should be for the defendants.

The demurrer to the defendants' rejoinder to the replication to the tenth plea, and the demurrer to the replication, to the eleventh plea, involve the same question. The legislature, in my opinion, never meant that the double insurance must be an insurance legal at all events, and the plaintiffs'

proposition would go that length if what he is contending for be true. It was an insurance in fact that was intended. The corporation with which the second insurance was effected may never resist payment. It may not be their interest to do so, and it may have been well understood between the parties that the corporation would not do so, and the plaintiffs may have been quite content to rely upon the honor of the company. Besides that, however, there is nothing shewn on these pleadings which necessarily precludes the idea that the foreign corporation may not be legally liable on the contract in the foreign country. All that we determined was, that the foreign law created no mutuality of contract in this country, and that, according to our law, from what we did see, there might be no mutuality even according to the foreign law. The corporation in which the second insurance is effected in this case may be differently constituted, and may be liable to be sued for contracts made out of the country which granted the corporation, even upon policies granted on the mutual principle. The point decided in the case alluded to, is a very different one from the present. In the act of parliament creating these insurance companies there is no restriction to the insurance being a legal insurance in every respect, nor confining the second insurance to be one effected in this country; but the statute says, if it *exist or be effected in any other office, or from and by any other person or persons at the same time*. The judgment should be for the defendants, on these pleadings.

DRAPER, J., concurred.

Judgment for plaintiffs on demurrer to seventh plea,
and for defendants on the other pleadings.

O'REILY QUI TAM. v. ALLAN.

Penal actions—Jurisdiction of County Courts—4 & 5 Vic. ch. 12.

The County Courts have no jurisdiction in penal actions, unless it is expressly given to them by statute; and for this purpose they will not be included in the words "any court of record in Canada West."

This action was brought in the Queen's Bench to recover a penalty of £20, under statute 4 & 5 Vic. ch. 12, from the defendant, for not having duly made a return to the Quarter

Sessions of a conviction made before him and another justice (a). The plaintiff recovered a verdict for £20, and entered judgment; the master refusing to tax full costs, considering that the action might have been brought in the County Court.

Application was made to the learned Chief Justice of this court for an order to revise taxation, on the ground that the action could not have been brought in that court. His impression was that the statute 4 & 5 Vic. ch. 12, did not give jurisdiction to try such cases to the County Court, and he therefore granted the order, though he told the counsel on both sides that there seemed to be room for difference of opinion on the point of jurisdiction, and that it might be well to bring the question before the full court by moving against the order.

This was done accordingly by *Wilson*, Q. C., for the defendant, the master on revision of taxation having allowed Queen's Bench costs.

M. C. Cameron, contra.

ROBINSON, C. J., delivered the judgment of the Court.

We do not consider that the County Court was created with any view of giving to it jurisdiction in such cases, but only to enable it to try cases between party and party. Still, no doubt it is a court of record, though of inferior jurisdiction, and circumscribed as to locality; and if the Legislature should in express terms give it jurisdiction (as in statute 10 & 11 Vic. ch. 31, secs. 51 & 52, they have done) in suits for recovering forfeitures and penalties, there could be no difficulty; but jurisdiction is not conferred in express terms on the County Courts by the statute in question—4 & 5 Vic. ch. 12. It enacts that justices of the peace not making a return as the statute directs to the Court of Quarter Sessions, of any conviction made before them, shall forfeit £20, "together with full costs of suit, to be recovered by any person who shall sue for the same by bill, plaint, or information in any court of record in Canada West," one moiety to be paid to the party suing, and the other to Her Majesty's Receiver General.

(a) See the case reported on motion for a new trial, ante page 411.

It cannot be denied that every one of our County Courts is "a court of record in Canada West," and therefore comes literally under the statute; and the third clause provides that if the plaintiff becomes nonsuit or discontinues, or a verdict passes against him, the defendant shall recover his full costs of suit, as between attorney and client.

Gregory's case (6 Co. 19) is precisely in point, being an action in an inferior court of record for Ludlow, to recover a penalty given by statute, to be recovered by bill, plaint, or information, in any court of record, in which however it was added, no essoin, protection, &c., should be allowed, which in this and other cases has been relied upon as furnishing an argument, in addition to others, against such a provision being construed to give jurisdiction to any inferior court of record. The court, without founding their decision upon these words—"that no essoin, protection, or wager of law shall be allowed"—adjudged that under such words as were there used, the superior courts at Westminster Hall alone had jurisdiction. Miller's case (Cro. Jac. 538) is to the same effect, and *Wilkinson v. Nethersol* (Cro. Eliz. 530,) and *Walwin v. Smith* (1 Salk. 178.)

In the treatise on penal actions by Mr. Espinasse (p. 27), who was a careful compiler, there is a section in which he treats at some length upon the proper court or jurisdiction for entertaining penal actions, and he lays it down that where a penalty given by statute to be recovered in any court of record, then, although there are many other courts of record, they shall confine the proceedings to the superior courts at Westminster, and the penalties can only be recovered there; for every penal statute is to be construed strictly, and as these are the only courts in which the King's Attorney General is supposed to attend, it must be presumed that the legislature contemplates those courts only, so that, although the term courts of record would embrace many other courts than those of Westminster, the jurisdiction given shall not be construed by any implication to comprise more courts than those expressly mentioned, which are sufficient to satisfy the terms as used in the statute.

And he says, in a subsequent passage, that the difference

in this respect between superior and inferior courts is this "that the courts above may have jurisdiction by implication though they are not named ; but no inferior court or jurisdiction can have cognizance of any penalty recoverable under a penal statute by implication ; they must be expressly mentioned in the statutes themselves, and cognizance be given to them in express terms."

There are cases of statutes giving actions of debt where no right of action would otherwise have existed, as in actions for calls against shareholders in joint stock companies, where the demand is purely of a civil nature, and may be regarded as arising out of a contract, express or implied ; but in this case there is an offence first to be tried, and the county courts were not created for any such purpose.

We think all that we find as authority makes it proper for us to hold that the party in this case could not have sued in the County Court, the same being an inferior court of local jurisdiction, instituted for the trial of causes between party and party, and in cases of debt upon contracts express or implied, and having no criminal jurisdiction and the proceedings mentioned in the statute, by bill plaint or information, being moreover none of them their ordinary and appropriate methods of proceeding. So far as my knowledge extends, I believe the district courts and county courts have never in any such case entertained a suit for a penalty except perhaps where a statute has in express terms given jurisdiction to such courts. In the absence of such express words, we must take the legislature to have intended only the courts of record of superior general jurisdiction. And the fact that in one case at least, if in no other, they have expressly enacted that actions for penalties may be brought in the district or county courts, affords rather an argument that where they have meant it, they have said it, and do not mean that such courts shall be included by giving a more extensive construction to the words "courts of record" than is given upon general principles of law.

Rule discharged.

FERGUSON V. HILL ET AL.

Conveyance of growing timber--Registration.

He'd (affirming the decision in *Ellis v. Grubb*, 3 O. S. 611) that growing timber is so far real estate that a conveyance of it by the owner of the fee is within the registry acts.

This was an action of trespass for carrying away trees on certain land in the county of Elgin, tried at London before *Robinson*, C. J.

The defendants pleaded—1st, not guilty; and 2ndly, that the trees were not the property of the plaintiff.

The jury found for the plaintiff, and 20s. damages.

Becher obtained a rule nisi for a new trial for misdirection, and on the law and evidence; to which *Cooper* shewed cause.

The facts of the case, and the authorities cited, are fully stated in the judgment of the court, delivered by

ROBINSON, C. J.—It appeared that one Isaac Griffin being seized of fifty acres of land in Bayham, on the 7th of September, 1850, by his deed under seal sold and conveyed all the pine trees growing thereon to one Sackett. This deed was never registered, probably because the parties were not aware that the Registry Act extended to the sale of such an interest.

On the 20th of May, 1852, Griffin sold the same fifty acres of land to this plaintiff, and conveyed them to him by an ordinary deed of bargain and sale, making no reservation of the pine trees, and taking no notice in the deed of their having been sold to Sackett.

The title of this land was a registered title before either of these transactions, and the deed from Griffin to the plaintiff was registered.

The plaintiff, soon after he purchased went to live upon the land, and while he was there these defendants, having been employed by Sackett, before the plaintiff made his purchase, to cut and remove the pine timber for him, persisted in doing so, notwithstanding the plaintiff forbade them. It was for this trespass the action was brought. The timber was proved to have been of a good quality, and very valuable.

The evidence was such as to shew beyond all doubt that when the plaintiff bought and before he was even in treaty for the lot, he knew well that the pine timber had been sold to Sackett, who had paid for it, and had taken some of it off. Griffin had instructed the person who prepared the deed to insert a reservation of the timber, but the plaintiff objected saying that having anything of that kind in the deed would prejudice his title, and prevailed upon the person to omit it.

Griffin was unwilling to execute the deed unless it contained a reservation of the timber, but the plaintiff overcame his scruples, by telling him that he might as well trust to his honor, as another person had, to whom the plaintiff had sold the adjoining fifty acres under similar circumstances, trusting that the grantee would make no objection to the vendee of the timber removing it.

In this latter case the confidence was not abused, for the vendee was freely allowed to take the timber which had been sold to him ; but this plaintiff, after inducing Griffin to trust to his honor,—either meditating at the time the unfair advantage which he attempted to take, or being badly advised afterwards,—surprised Griffin and many others of his neighbors who knew perfectly well from his own statements the understanding on which he bought the land, by insisting upon his right to keep the pine timber, and to set both Griffin and Sackett at defiance, in consequence of his having registered his conveyance of the land which contained no exception of the timber, while the deed to Sackett of the standing timber remained unregistered ; and, persisting in this claim he brings this action to recover the value of the pine timber taken.

There was some evidence, but not by any means precise and positive, of Griffin having verbally made a lease to Sackett of the land for three years, in order to enable him to take away the timber without molestation. It did not appear that any term was created, or any rent stipulated for. It was rather a collateral understanding, soon after the timber was sold that Sackett was to be allowed three years to remove the timber in, and was to have free right to enter for that purpose. There was a good deal in the evidence that might have supported a plea of license, but there was no such defence upon the record.

The plaintiff, for some time after he had made his purchase, acted and spoke as if he were fully acquiescing in the right of Sackett to take the timber. He even urged these defendants, who were employed by Sackett, to cut and remove it, to do so speedily, as he wished to clear some of the land ; and he offered to take the job under Hill in execution of the contract of the latter with Sackett.

Under the pleadings, however, the case turned wholly on the second plea, which denied the plaintiff's property in the pine timber,—and that question of property depended upon the point, whether Sackett by omitting to register his deed had lost the benefit of his purchase, by reason of the prior registry of the subsequent conveyance of the land, without any exception of the timber, to the plaintiff.

I had a recollection at the trial of the case of *Ellis v. Grubb*, decided in this court many years ago, which brought up a similar question (3 O. S. 611), but I had an impression on my mind that something I had seen since had led me to doubt whether that case had been properly decided, and I intimated this at the trial, though I ruled in accordance with the judgment in that case, which I knew had been carefully considered at the time, and I left it to the defendant to move for a new trial or not upon that point as he might be advised.

There was another point in the case, as to the effect of the alleged verbal lease. That, it appeared to me, could only have the effect of making the entry legal, if there had been a plea founded upon it ; but this entry upon the place had not been complained of as a trespass, so that it was unnecessary to consider this. The only question was to whom these trees belonged as they stood, and if they must be regarded as real estate, and coming within the Registry Act, as being included in the terms "*lands, tenements, or hereditaments*," then the effect of the registry of the plaintiff's conveyance must be to make the former unregistered conveyance fraudulent and void, so that nothing could pass under it. I was desirous of finding some ground, if I could, on which the defendant's case might be supported, for no action could have less merit in it than the plaintiff's, but I felt myself constrained at the close of the case to tell the jury, that in law under the

operation of the Registry Act, the plaintiff was entitled to their verdict, but that in giving damages I thought they might properly consider all the circumstances:—that the plaintiff had knowingly bought the land without the timber, giving, as we must suppose, and as indeed he was proved to have admitted, the value of the soil merely—that his damage, therefore, was only nominal and imaginary, not real and substantial. The jury gave twenty shillings damages, and the defendants have moved against this verdict, in the hope that the court might find themselves warranted in determining that the law of the case was with the defendants, so that they might properly have received at the trial a verdict in their favor.

On comparing this case with *Ellis v. Grubb* (3 O. S. 611) we see nothing to distinguish it that would warrant a different decision.

I think what I alluded to at the trial as having suggested a doubt to me respecting that decision was the principle which we find stated in the books, that after growing timber upon a place has been alienated in any manner that will bind, it becomes in contemplation of law severed from the freehold, and may be transferred by the vendee to a third party like any other chattel, and with no more formality. But upon consideration there was no room for the application of that principle in *Ellis v. Grubb*, any more than in this case, for the contest in both was about the validity of the *first* sale under the circumstances; that is, the sale which was to sever the trees from the realty of which they had up to that time formed a part. Or I may more probably have been led to question the correctness of our judgment in *Ellis v. Grubb*, by meeting afterwards what is said in 1 Lord Raymond's Reports, 182, and which is directly at variance with our decision. Chief Justice Treby, it is there said, reported to the other justices, that it was a question before him at a trial at Nisi Prius at Guild Hall, whether the sale of timber growing upon the lands ought to be in writing by the Statute of Frauds, or might be by parol; and he was of opinion, and gave the rule accordingly, that it might be by parol, because it is but a bare chattel; and to this opinion Powell, J., agreed." Treby and Powell are names of great

authority. No doubt is intimated in Lord Raymond's Reports of the soundness of this doctrine; and in *Mayfield v. Wadsley* (3 B. & C. 364), Holroyd, J., who was one of the soundest and most cautious judges of his time, cites this *dictum* from Lord Raymond's Reports as law, not questioning its accuracy. But in *Scorell v. Boxall* (1 Y. & J. 396) the court repudiated wholly the *dictum* cited from Lord Raymond's Reports, remarking that if that were law the several modern cases which have been decided never could have arisen. Baron Hullock observed that he had never before heard it cited as an authority and the only claim which it had in his opinion, to that distinction was the allusion to it by Mr. Justice Holroyd.

We should not find ourselves warranted by anything that I have discovered since the trial of this case, in departing from the case of *Ellis v. Grubb*. We therefore discharge this rule.

Rule discharged.

LAWRASON V. PAUL.

Nuisance—Action for, by reversioner.

The defendant having erected a stable on his own ground, adjoining a dwelling house owned by the plaintiff and rented to one W———
Held, that this was not such a nuisance as would support an action by the plaintiff as reversioner, though it was shewn that he had been obliged in consequence of it to accept a lower rent for his house.

CASE for a nuisance.

The plaintiff declared, that whereas, before the grievances complained of, a certain dwelling house and premises were in the occupation of one William Wright, as tenant thereof to the plaintiff, the reversion being in him the plaintiff;—that the defendant was in possession of certain lands, with a barn thereon adjoining the said premises first mentioned; and that the defendant, well knowing the premises, and wrongfully intending to aggrieve and injure the plaintiff in his reversionary estate and interest, while the dwelling house, &c. of the plaintiff was so in the possession of his tenant as aforesaid and while the plaintiff was so interested therein as aforesaid, viz., on the 1st of August, 1852, and on divers other days and times, &c. wrongfully erected and placed a certain building on his the defendant's land, abutting on and adjoining the said

dwelling-house of the plaintiff, close to and against the said dwelling-house, and wrongfully kept and continued the said building so erected &c., from thence hitherto, and wrongfully and injuriously kept in the said building divers horses, and thereby caused, during all the time aforesaid great noise and disturbances therein by day and by night; and on the several days and times aforesaid wrongfully kept and still keeps in the said building, and in and about the said piece of ground of the defendant, close to the said dwelling-house of the plaintiff, divers large quantities of dung, filth, and manure, by means whereof divers noisome, noxious, and offensive vapours, fumes, smokes, smells, and stench, at the time aforesaid, issued and proceeded, and still issue and proceed from the said building and ground of the defendant, and entered into and spread, and still enter into and spread, upon, through and about the dwelling house and premises of the plaintiff; and the air over, through, and about the same, was and is thereby filled and impregnated with offensive and uncomfortable smells, and was and still is rendered offensive and uncomfortable—by means of which premises the plaintiff hath been and is greatly injured, prejudiced and aggrieved in his reversionary estate and interest of and in the said dwelling house and premises so in the occupation and possession of his said tenant, and the same hath thereby become and is lowered and lessened in value, to the damage of the plaintiff of fifty pounds, &c.

The defendant pleaded—1st, not guilty: 2dly, that Wright was not in possession as alleged: 3rdly and 4thly, denying the noise and the noxious smells, &c.

The case was tried before *Robinson, C. J.*, at London. The evidence was to the effect that, in the opinion of some of the witnesses the smell arising from the dung heap was very offensive to the occupants of the house belonging to the plaintiff, while others thought there was nothing unusually offensive. The defendant it seemed, soon after he became the owner of the land adjoining to the plaintiff's house, removed a stable which had stood upon land in the vicinity, and placed it on his land adjoining the plaintiff's, placing it in a range with the plaintiff's house in front, close upon the

street, and with the end of it not more than ten inches distant from the end of the plaintiff's house. This stable or barn, having been used for some years before it was brought there, was described by some of the witnesses as having the floor saturated with the wet filth of a stable yard, and on that account peculiarly offensive.

The manure accumulating from the daily use of the building in its new position was thrown out, as usual, behind the building in the defendant's yard, and there were some piles of cordwood between the heap and the fence which divided the defendant's land from the plaintiff's.

Wright was a tenant by the month, but complaining much of the noise of the horses at night, and of the offensive smells occasioned by the stable being placed so very close to the house, he threatened to leave unless the plaintiff would agree to make a great deduction from the rent, and the plaintiff, in order to keep him, did reduce the rent. The plaintiff relied much on this, as being such an injury to him as reversioner as would support an action for the nuisance.

The learned Chief Justice told the jury that he did not think the nuisances proved, or attempted to be proved, were such as could support an action by the reversioner, being a present inconvenience only to the occupant; and that, as to the consequent abatement in the rent, if that would support the action, it ought to have been specially alleged in the declaration.

The jury found for the defendant.

Becher moved for a new trial without costs, on the grounds of misdirection, and on the law and evidence, or for a new trial on payment of costs, with leave to the plaintiff to amend his declaration.

M. C. Cameron shewed cause, and cited *Baxter v. Taylor* 4 B. & Ad. 72; 1 N. & M. 11, S. C.; *Jackson v. Pesked*, 1 M. & S. 234; *Young v. Spencer*, 10 B. & C. 145; *Tucker v. Newman*, 11 A. & E. 40; *Shadwell v. Hutchinson*, 3 C. & P. 615; *Jesser v. Gifford*, 4 Burr. 241.

ROBINSON, C. J.—I was inclined at the trial to reserve for the consideration of this court the question whether an action

would lie by the reversioner for such nuisances as were alleged and proved in this case, but there was a desire expressed to go to the jury,—and having to state my view of the legal question, I directed the jury as has been mentioned.

They retired, and were out some time, and found their verdict for the defendant; whether because they understood from me that the nuisance attempted to be proved was not such as the reversioner could sustain an action for, or because they were not satisfied that the evidence established that there was a nuisance even to the occupant, I cannot say. I have not a strong impression that the jury would have found the defendant guilty of a nuisance, even if it had been the tenant that was suing; for one of the plaintiff's witnesses, and his principal one, stated on cross-examination that he could not say there was anything particular to complain of in regard to the defendant's stables, and that it was much like others in regard to the annoyance occasioned by it.

I confess I think it not very clear that what was proved in this case amounted to a nuisance, though unquestionably no one would like to have his neighbour's stable so near to him. If we consider for a moment what we have always observed to be the case in regard to livery stables even, not to speak of other stables which are to be found in all parts of towns and cities, I do not see the ground clear for holding the defendant's stable to be a nuisance. Could he be compelled by indictment to remove it, on the ground that it is offensive by the noise of the horses, and by the smell of the manure to those who pass by it on the highway? I think not. We all know to how much greater annoyance people are frequently exposed from the smell of manure being spread upon gardens and used in hot-beds, and yet I have never known this complained of as a nuisance. No doubt what is complained of in this case would make a residence in the plaintiff's house much less eligible than if a quiet respectable family lived in a good house upon the spot where the stable now stands. But we might say the same if a low tavern, or a tinsmith's shop, or a smithy had been kept there by the defendant. Many things may be done that are not illegal by a proprietor upon his own ground, which will induce respectable tenants

to prefer other neighbourhoods, and so in effect diminish the value of the property adjacent. To hold this to have been a nuisance, and also such a nuisance as the reversioner could recover damages for, would, I think, be carrying the law on this point further than it has yet been carried. Noise of horses kicking, and the bad smells of a dung heap in a stable yard, are both annoyances of a very transient kind, and such as affect only the present occupants. The only allegation in the declaration is,—“that the dwelling house in the possession of the defendant's tenant has been thereby *lowered and lessened in value.*” This imports no more than that if the reversioner were now in a condition to sell the house, he could not get any one to give so much for it as before, on account of the noise and the bad smells which his tenant is now suffering, but which, for all we can tell, may cease in a month or week, and at any rate before the reversioner could get into the possession of his property. Upon the same principle the reversioner could in every case that can be imagined sustain an action, if the tenant could, and there would be no meaning in the distinction stated in every book upon this subject.

The case of *Baxter v. Taylor* (1 N. & M. 11) is against this action, and so I think is the judgment in *Bower v. Hill* (1 Bing. N. C. 555) if we regard the general tendency of the language of the court, though there are some expressions that may seem comprehensive enough even to support this case.

In *Dobson v. Blackmore* (9 Q. B. 1003-4), Lord Denman certainly places the right of a reversioner to sue in such cases upon a ground that would not sustain this action. I refer also to *Hopwood v. Schofield* (2 Moo. & Rob. 34).

On the whole, I am disposed to think that the jury would have been warranted in not treating the stable as a nuisance, though undoubtedly it rendered the plaintiff's house a less desirable place of residence;—and if the noise made by the horses and the smell of the dung at the back of the stable were so disagreeable and offensive as to constitute a nuisance, still I think they were not injuries of that permanent character that they have been allowed to sustain an action by the reversioner in any case that has been hitherto determined.

The fact that the tenant, being a monthly tenant, would have left on account of them, and was only retained by the plaintiff submitting to a reduction of the rent, was undoubtedly proof of a particular pecuniary injury actually suffered by the plaintiff; but to make that a ground for the recovery it ought, I think, to have been set out as a special damage upon the record. I doubt whether that would have affected the final disposal of the case; for the same thing would probably have happened if the defendant had set up a foundry there, or opened a school for teaching music.

But if my brothers had thought that the action could be sustained by going to trial again upon an amended declaration, I should have had no objections to concur in setting aside this verdict on payment of costs; for it is very true that as regards the mere question of nuisance or no nuisance, where noisy trades or noxious smells are complained of, it is difficult to perceive any line clearly established by the cases, and there is a good deal of apparent contradiction in them, which could hardly be avoided, considering the nature of the question.

As I understand, my brothers do not incline to disturb the verdict, being of opinion that if a nuisance was proved at all it was of that temporary and transient character that it does not entitle the plaintiff to sue as reversioner.

BURNS, J.—I am of opinion that the direction of the learned Chief Justice at the trial was correct, and that the present action is not sustainable by the plaintiff in his capacity of reversioner. Whether the tenants would have a right to complain of the noise made by the horses in the stable and by reason of the manure thrown out so close to the plaintiff's premises, is another question. In the case of *Walter et al. v. Selfe* (15 Jur. 416, 4 Eng. Repts. 15), Vice Chancellor Knight Bruce, speaking of the nuisance of brick-making, thus defines what would be the rights of occupiers: "The important point next for decision may properly, I conceive, be thus put;—ought this inconvenience to be considered in fact as more than fanciful, or as one of mere delicacy or fastidiousness—as an inconvenience materially interfering

with the ordinary comfort, physically, of human existence ; not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among English people ? And I am of opinion that this point is against the defendant. As far as the human frame, in an average state of health at least, is concerned, mere insalubrity mere unwholesomeness, may possibly be out of the case ; but the same may perhaps be asserted of melted tallow, and other such inventions, less sweet than wholesome. That does not decide the dispute. Smell may be sickening, though not in a medical sense. Ingredients may be, I believe, mixed with air of such a nature as to affect the palate disagreeably and offensively, though not unwholesomely ; a man's body may be in a state of chronic discomfort and still retaining its health, and perhaps suffer more annoyance from impure or foetid air from being in a hale condition. Nor do I conceive it essential to show that vegetable life, or that health, either universally or in particular instances, is noxiously affected by contact with vapour and floating substances proceeding from burning bricks ; for the plaintiffs have, I think, established that the defendant's intended proceeding will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort and existence to the occupier and inmates of the plaintiff's house, whatever their rank or station, or whatever their state of health may be."

In order that this plaintiff can sustain an action of this nature it is necessary that he should prove a substantial injury of a permanent nature to his property ; and he endeavours to make that appear to be so because he cannot rent the premises for as much as if there were no stable adjoining his premises. The injury complained of is of a personal character, and, according to the nature of the business, may be only temporary. A case of *Ridgell v. Moor* (14 Jur. 790) was an action by the reversioner, because the defendant fastened a gate across a way, and thereby obstructed the right. The objection was raised upon a motion in arrest of judgment that the action was not sustainable. No objection was made to the effect of the evidence at the trial. The court refused to arrest the judgment because there was an allegation that the reversion

was injured by the gate being fastened up, and it might be that such a thing would injure the reversion as well as building a wall across the way, and after verdict it must be held to be so determined. The court however were careful to distinguish the case from the point where the insufficiency of the case and evidence is objected to at the trial. Now here every objection was taken at the trial, and the only question is, whether the evidence is of that nature that we can say there was anything to be submitted to the jury affecting the reversion which would give the reversioner a legal right of action. So far from there being evidence to submit to the jury upon that question, I think there was none. The evidence of inconvenience applied only to the occupiers, and though the proprietor was obliged to lower the rent because some tenants would not give so much by reason of the noise, &c. so near them, yet that is only a personal matter. Suppose both premises had belonged to the same person, he might not be unwilling to have the stable adjoining his house; or suppose the proprietor of the stable had desired to rent the premises in order to live close by his stable, he might be willing to give the landlord the full value. It is therefore a matter of personal choice, and only affects the property according to the choice of the parties desiring it. I take it that it is not sufficient in an action by the reversioner simply to shew that he cannot get so much rent, or cannot sell the property for so much, by reason of a personal inconvenience to the occupier of the premises, unless the inconvenience amounts, as the Vice Chancellor says, to interfering with the ordinary comfort physically of human existence, according to plain, sober, and simple notions among the English people. The taste of some may be such that they would not desire to live in the neighbourhood of a railway station, where they may be awakened at all hours of the night by the noise of the locomotives; and that they would by no means pay so high a rent as in a more retired place or more fashionable street of a city: but I apprehend the owners of property never imagined they could maintain an action, claiming that the reversioner in the property was injured in consequence.

I think the plaintiff has failed to establish a case for

damage, and that the jury were rightly directed to find for the defendant.

DRAPER, J., concurred.

Rule discharged.

GINN V. SCOTT.

Jurisdiction of Division Courts—"Torts to personal chattels,"—13 & 14 Vic., ch. 53, sec. 23—Application by defendant to set off excess of costs under sec. 78.

In an action of trover for a deed the jury gave a verdict for £24 16s. It was ordered, on motion, that a new trial should be granted, unless the plaintiff would accept nominal damages, and he thereupon consented that the verdict should be so reduced.

The Court, under these circumstances, refused an application to compel the plaintiff to enter judgment and tax his costs, or to allow the defendant to do so for him, in order to set off the costs of defence, and recover the excess over the plaintiff's verdict and taxable costs—*first*, because it is not clear that an action of this nature is within the jurisdiction of the Division Court; and, *secondly*, because the verdict was not reduced until after the trial, and the plaintiff therefore had no opportunity to apply for a certificate, which perhaps he might otherwise have obtained.

Hurd, on the last day of Michaelmas Term, moved (with the assent of the plaintiff's attorney) that the plaintiff should be called upon to shew cause on the first day of this term why it should not be ordered, that the plaintiff, within ten days after notice requiring him to do so, should enter judgment and tax his costs in this cause, in order that the defendant might set off the excess of his costs of defence, as between attorney and client, over his division court costs, against the plaintiff's taxable costs, and obtain execution against the plaintiff, if the costs so to be set off should exceed the plaintiff's verdict and taxable costs, for the amount of such last mentioned excess, with the costs of such execution; and in default thereof to deliver the record to the defendant. And that the defendant should be at liberty after such default to make up a judgment roll and bill of costs for the plaintiff, and to cause the plaintiff's costs to be taxed, and his own costs as aforesaid, and the excess so set off, and to issue execution for any such excess, and enforce the same, with payment of the costs, under the provisions of 13 & 14 Vic., ch. 53, sec. 78.

It was admitted that no notice of taxation had been given to the defendant, nor any judgment entered by the plaintiff.

Sandall v. Bennett, 3 Dowl. 294; *Forman v. Dawes*, 11 M.

& W. 730; Defries v. Snell, 4 Dowl. 680; Jones v. Harris, 1 Dowl. 433, were cited in support of the application.

A. McLean shewed cause, and cited Todd v. Emly, 11 M. & W. 610; Lowley v. Rossi, 12 Q. B. 952; Butler v. Corney, 2 Ex. 474; Abley v. Dale, 11 C. B. 889.

The action was one of trover for a bond, in which the plaintiff recovered a verdict for £24 16s., which this court was afterwards moved to set aside, upon its being shewn clearly by affidavits, as in fact it was also shewn upon the trial, that the plaintiff had ceased to have any beneficial interest in the bond, or any claim under it, the condition having been in effect performed.

The learned judge recommended to the jury to find no more than nominal damages, but they found the verdict above mentioned.

This court determined, upon hearing the parties, that there should be a new trial, unless the plaintiff would agree to reduce his verdict to a shilling, which he consented to do, and the verdict was accordingly so reduced.

In Hilary Term, 1853, the defendant's attorney obtained an order that the judgment be entered and costs taxed at the principal office in Toronto, and that the plaintiff's attorney should give notice to the defendant's attorney of such taxation and entry of judgment. The defendant's attorney served notice of appointment to tax costs, but the plaintiff had taken no steps.

ROBINSON, C. J., delivered the judgment of the court.

The first question is whether an action of trover for a deed comes clearly within the jurisdiction of the division courts, under the 23rd clause of 13 & 14 Vic. ch. 53, which gives jurisdiction to the amount of £10 "*in all torts in personal chattels.*" The instrument in question was a bond for a deed of land. It was in this sense a chattel, that it had not the character of real property; but if we look to anything beyond the value of the paper on which it was written, in order to give it a substantial value, we must then regard it as a chose in action—which is defined to be "a thing incorporeal and only a right," something which is not recognized as having

any actual existence, and of which any one can be said to have possession. I doubt whether a party suing for the detention or conversion of an agreement to convey land comes within the definition of a person complaining of a tort to personal chattels. Upon this point I refer to 8 Co. 33, and to the case of *Chanel v. Robotham* (Yelv. 68).

Admitting that he does, however, the circumstances ought to have been brought before us by affidavits filed in support of this application, so that we could have seen judicially upon what grounds the verdict was reduced, on the recommendation of the court, to a shilling. We know, in point of fact, that the jury gave their verdict for the plaintiff for upwards of £20, which was far beyond the jurisdiction that any Division Court can assume in an action of trover. No certificate therefore was required to be moved for, or could have been obtained by the plaintiff at the trial; and yet, if the plaintiff shall lose his costs under the 78th clause of the statute, it will be because he did not obtain such a certificate, which would be repugnant to reason.

If we are at liberty now to consider all the facts which have been before us upon other applications in this cause, we must recollect that when a new trial was moved for, we should have granted it upon what was shewn to us, unless the plaintiff had consented to take a verdict for nominal damages. That being signified to him, he assented to it; but he might not have done so if he had understood it to be a necessary consequence that for want of a certificate, which it would be impossible for him afterwards to obtain, he must lose his costs. If at the trial the jury had given but one shilling damages, the plaintiff might, for anything we can see, have obtained from the judge who presided a certificate that would have given him his costs; and it seems to us to be at least very doubtful whether in such a case as this, where the verdict has been reduced at the suggestion of the court, being after the trial, though with the plaintiff's assent, he can be properly deprived of his costs under the 78th clause.

If it were even clear that he could, and clear also that trover will lie in the Division Court upon such a cause of action, then we might perhaps find that we could make an

order to compel the plaintiff to tax his costs, and bring in his roll and enter judgment, or allow the defendant, upon notice of taxation, to tax the plaintiff's costs and enter judgment; or, on mature consideration, we might think a suggestion necessary.

But we discharge this rule on the two grounds—that we do not take trover for a deed to come certainly within the words “*torts to personal chattels*,” so as to bring the action within the jurisdiction of the Division Court; and that we think we should not deprive the plaintiff of his costs, when the verdict given at the trial was for a sum beyond the amount that could have been given in the Division Court, which made it impossible for him to move for a certificate, and was reduced to a shilling by assent of the plaintiff and the act of the court, after the time had gone by when the opinion of the judge who tried the cause could be taken as to the propriety of its being brought in the Queen's Bench.

Rule discharged.

McBRIDE V. SILVERTHORNE.

Contract for sale of goods—No specific price mentioned—Receipt—Evidence.

A contract to sell wheat and deliver it at the buyer's mill within a reasonable time, the seller to receive whatever may be the highest market price at the time when he shall demand payment, is valid; for, though no specific price is fixed, it may be ascertained at any time by the method agreed upon, and will then have relation back to the original contract.

The plaintiff agreed verbally with the defendant to sell and deliver wheat to him on the terms above stated, and on delivery he received a receipt, signed by defendant's miller, as follows:—“Received *in store* from Joseph McBride for Mr. do. do. 51 bushels fall wheat, £ s. d.” &c.

Held, that the words of the receipt expressing the wheat to have been received “*in store*” did not preclude the plaintiff from proving an absolute sale on the terms above set forth.

ASSUMPSIT.—The first count of the declaration stated, that in consideration that the plaintiff would sell to the defendant certain wheat, or deliver it to the defendant at his mill in the Township of Toronto within a reasonable time, the defendant promised to pay the plaintiff at the highest market price per bushel that could be obtained for wheat at the township aforesaid on the day when the plaintiff should demand payment. The plaintiff averred that he, confiding, &c., did sell and deliver to the defendant 2,500 bushels of wheat on the terms aforesaid; and although heretofore, to wit, on &c., the highest market price per bushel

for wheat in the township aforesaid was 6s. 6d., and although the plaintiff on that day demanded payment for his wheat so delivered, yet the defendant did not and would not pay.

There were common counts, for goods sold and delivered, work and materials, money received, and on account stated.

The defendant pleaded *non assumpsit* to the whole declaration; and to the first count, that the plaintiff did not sell and deliver to the defendant the said quantity of wheat in the first count mentioned, upon the terms and in manner and form as alleged.

The case was tried at Toronto, in January, 1854, before *Draper, J.* The plaintiff called one of his sons, who proved that about the beginning of 1853 he went with the plaintiff to the defendant's mill in the Township of Toronto; that the defendant was then paying 4s. 4½d. per bushel for wheat, and that he told the plaintiff that if he did not like that, he would pay him the highest price whenever he called for his money; that the plaintiff wished the defendant to mark 4s. 4½d. per bushel on the receipt, so that at all events the plaintiff should get that price, with the chance of getting more if the price should rise; but the defendant refused this, saying he would not give two chances for one, and it ended in the defendant's agreeing to pay whatever might be the market price when the plaintiff should call for his money. On cross-examination this witness, who appeared not to be very intelligent, said it was finally agreed that the defendant should buy of the plaintiff at 4s. 4½d. per bushel; that the wheat was to be paid for at 4s. 4½d. when delivered; that the plaintiff was to have the rise of the market; that the defendant offered 4s. 4½d. at that time, or, if the plaintiff did not like that, he would pay him when he called for his money; that the wheat was sold on condition, if the plaintiff liked the 4s. 4½d., if the plaintiff did not like that, the defendant would pay him market price: that the sale was left to be determined on at a future period. On his re-examination he repeated the agreement as stated on his examination in chief. The plaintiff also called the defendant's miller, who swore that the plaintiff's sons (one of them the last witness) came in January with two loads of wheat, and he inquired if

they were selling or storing; that they said storing, and thereupon he, on the defendant's behalf, gave a receipt in the following form:—

"Not transferable." }	"No. 572.
	"Meadowvale Mills, Jan. 5th, 1853.
	"Received in store from Mr. Joseph McBride, for Mr.
	do. do., fifty-one bushels 21 lbs. fall wheat. at —s. —d., amounting to £— —s. —d. currency. 51 bush. 21 lbs.
	"F. SILVERTHORNE,
	"Per A. G. SMALL."

that the wheat as delivered was turned into the defendant's general stock; was ground, and replaced again by other wheat purchased by defendant from other parties; that the plaintiff's wheat was among the first that was brought in, and probably every pound of it was ground into flour; that he understood the plaintiff had a right to be paid at the market price, whatever it was, whenever he called for his money, and that the defendant had a perfect right to sell or grind the wheat delivered by the plaintiff, but still he considered it the plaintiff's till it was sold; that the defendant would have paid the price to any one who produced the receipts, or have delivered flour to him, though they were marked "Not transferable." The defendant's mill broke down in August, 1853, and all the wheat in it, excepting about 700 bushels, was removed to another mill. On the 14th of November, 1853, the defendant's mill had 13,000 bushels of wheat in it, and on that day the mill was burned. This witness stated that on such receipts as these he never knew any party demand wheat back again. The plaintiff proved a demand after the fire, and that the defendant said he would settle with him if he would take some of the burnt wheat, which the plaintiff refused. The market price at the time of the demand was 5s. 9d. per bushel. The whole quantity delivered by the plaintiff was 2,306 bushels.

A nonsuit was moved for, on the ground that the first count was not proved; that the contract in evidence was a delivery of wheat to be stored, with a right to the defendant to buy it at any time at the market price; that the receipts put in by the plaintiff showed a contract "*to store*," and this could not be waived by other verbal evidence to

show a sale; also, that on the evidence the defence was proved. The motion was refused, leave being reserved to move on the first two objections.

On the defence a conversation with a witness was proved, in which the plaintiff at first stated, in reference to this transaction, that he had not sold the wheat, but that the defendant had offered to buy at 4s. 4½d. per bushel, which the plaintiff would not take; that the plaintiff wished the defendant to put 4s. 4½d. on the receipts, and give him the rise, which the defendant would not do, saying it would give the plaintiff all the chance; and that at last it was arranged that the plaintiff should have the highest market price when he would call for his money.

The jury were directed that there was evidence to go to them to sustain the special count; that if proved to their satisfaction that the plaintiff should sell and deliver his wheat to the defendant, the price to be ascertained by whatever was the current market price on the day when the plaintiff demanded payment, it was a valid contract; that the words "*in store*" in the receipt did not preclude the plaintiff from proving such a contract as the first count set forth, though if they believed the plaintiff really declared that he never had sold the wheat, they should weigh this declaration in considering the effect of the whole evidence; that even if the special contract was not proved, there was evidence on the count for goods sold and delivered, for if the defendant received the wheat in store, with a right to purchase it at a future time, his making use of it afforded proof of his election to purchase, or he was a wrongdoer in using it, and the plaintiff might waive the tort and sue in assumpsit.

The jury found for the plaintiff on the first count £576 10s.

The defendant's counsel excepted to any question being raised as to the defendant's being a wrong-doer in using the wheat, contending that there was nothing in the evidence to justify it.

Hagarty, Q. C., obtained a rule *nisi* for a nonsuit on the leave reserved, or for a new trial on the law and evidence, and for misdirection. He renewed his objection that verbal evidence should not have been received to contradict

or explain the written receipt which shewed that the wheat was received in store.

Bell shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We are all of opinion that this verdict was properly rendered for the plaintiff. It is true the general principle is, that it is a necessary ingredient in a sale that there should be a price agreed upon; but the meaning of that is not that the parties are not bound as by a contract of sale, unless a specific price be fixed upon at the very time of the contract; for it is clearly laid down in books of good authority that "although no certain price be agreed to when the contract is entered into, yet if the parties settle between themselves some method by which it may be ascertained at a future period, the maxim *id certum est quod certum reddi potest* applies, and the price when so settled shall relate to the original contract."—Ross on Vendors, 51.

Too much importance, we think, was sought to be attached to the words of the receipts given for the several loads of wheat as they were delivered, as if they necessarily constituted the contract between the parties. Those were mere tickets given for ascertaining the quantity for which the defendant was to account to the plaintiff, upon the understanding that had been come to between them. They were not signed by either of the parties, but were only receipts given by the defendant's clerk to show the quantity acknowledged to be received. "Received in store from Joseph McBride for Joseph McBride" does not necessarily or certainly import anything more than that the defendant had received from McBride, or his servants, so much wheat, for which the defendant was to account to him, and not to any other party; in other words, wheat delivered by the plaintiff on his own account. The price per bushel being left blank, and there being blanks left in these printed tickets for the price per bushel to be inserted, shews that those were the receipts commonly given upon purchases of wheat, and shews also that in this case the price had not been fixed, which is consistent with the account given by the defendant's own miller, that the plaintiff had a right by

agreement to come at any future day (I suppose within the season of navigation) and name his price.

It is unfortunate for the defendant that his mills were afterwards burnt, as it renders him so much less able, unless he was insured, to comply with this as well as other engagements; but it has not been contended, and indeed could not be, that that misfortune can have had the effect of relieving the debtor from his liability; though if the plaintiff's wheat had been in store in the mill, and the defendant not otherwise accountable for it, then, as a warehouseman, no doubt he would have been exempt from responsibility for the loss of the wheat, unless the fire could have been shewn to have arisen from culpable negligence.

But it was proved, and is not denied, that very soon after the wheat was delivered the defendant ground it up and disposed of the flour as his own, which placed it out of the reach of the fire that afterwards destroyed the mill, and procured for him, as we may suppose, the value of the wheat from the persons to whom he sold it. He cannot, therefore, be in a situation to contend that there was no transfer of property. The only question can be, whether he is liable to pay for it a certain price, according to the terms of a special agreement, or not: if not, he must inevitably be liable as for wheat sold and delivered to him on the common counts; and either way the evidence sustains, in regard to amount, such a verdict as was given; for there can be no doubt that, in point of fact, the plaintiff was to be at liberty to call at any time, and close the question of price by reference to the then current price, which would be referred by relation back to the contract of sale, so as to entitle the plaintiff to receive that price as the value of his wheat.

Rule discharged.

SCANE V. HARTWICK.

Will—Excessive execution of power.

A testator devised to his wife all his property, real and personal, "as long as she, my said wife, shall exist; and at her decease the said property to be at her sole disposal unto any one or other of my descendants, so as the said property and land shall be entailed in the family, from one generation to another.

Held, that a devise by the widow *in fee* was an excessive execution of the power, and therefore void.

EJECTMENT—On the 23rd of November, 1839, Thomas Scane made his will, whereby he devised as follows:—"To my wife Mary, the whole of my property, real and personal, including the whole of my farm and premises, composed of the whole of Lot Number 6, in the 10th Concession of the Township of Howard, as long as she, my said wife Mary, shall exist; and at her decease the said property to be at her sole disposal, unto any one or other of my descendants, so as the said property and land shall be entailed in the family, from one generation to another." He died in possession of the land, and afterwards—viz., on the 11th of October, 1852—Mary Scane, his widow (the devisee), made her will, whereby she devised to her grandson John Hartwick (the defendant), his heirs and assigns for ever, the said Lot No. 6, in the 10th Concession of Howard. She died on the 7th of March, 1853.

The plaintiff was the eldest son of the testator, by a former wife.

The case was tried at Sandwich, before *Robinson, C. J.*, and a verdict taken for the plaintiff, subject to the opinion of the Court.

The question was, whether this devise made by the wife was wholly void, being to John Hartwick, the defendant, to hold *in fee simple*, in disregard of the terms of the power of disposal given by the husband's will, which limited the alienation to be made by her to *some one or more of her husband's descendants*, so that the estate should be entailed in the family from generation to generation.

Prince appeared for the plaintiff; *Duck* for the defendant. The authorities cited are noticed in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

It is clear that the widow took only an estate for life, with power to dispose of the land to some one of the testator's descendants, in such a manner as would preserve the estate in his family. The case cited by Mr. Duck, of *Liefe v. Saltingstone* (1 Mod. 189) is much in point. I refer also to *Tomlinson v. Dighton* (1 P. W. 149) as being still more applicable.

It is plain that this defendant could take no interest under the will of Mary Scane, unless that will can be regarded as an execution of the power of disposal given by her husband, because she had otherwise no power over the estate, having no interest or estate of her own in the land beyond her life interest. In *Tomlinson v. Dighton* the case was that Tomlinson devised to his wife for life (as in this case), and then to be at her disposal, provided it be to any of his children, if living, if not to any of his kindred that his wife shall please. Then the wife married again, and she and her second husband, by lease and re-lease, conveyed the premises to a trustee and his heirs, to the use of the wife for life, remainder to her daughter by her first husband (the testator), by whom she had also a son then living, and the heirs of her body, remainder to her son by her first husband, and his heirs.

Besides other objections to this execution of the power by the widow, two objections were taken, which are precisely the converse of those taken in this case. 1st—That the disposition should have been by will and not by deed, the devise being to her for life, and then to be at her disposal. 2ndly—That the appointment ought to have been of a fee simple, whereas she had appointed an estate tail.

To the first it was answered, that though it might be contended that the disposal should be by will, yet that she might dispose of the reversion in her lifetime; and 3 Leon. 71 was cited, which upon that point more resembled the present. In answer to the second objection it was said, that the power to dispose of a fee simple includes in it a power to dispose of any lesser estate. The court held that the conveyance was an effectual, though an improper execution of the power. There is no doubt that a power given generally may be executed by deed or will.

The questions then in this case seem to be reduced to these two: 1st—Is not the will of the widow here a bad execution of the power, inasmuch as it appoints a larger estate—that is, a fee simple—under a power to appoint an estate tail. 2ndly—If it be a bad execution of the power, can the defendant take anything under it; that is, can he hold for his life, or is the devise to him wholly void.

We are of opinion that the devise to the grandson in fee simple was a void execution of the power given to the widow by her husband's will; that in a court of law the estate can be to no extent and in no manner affected by it, and that the defendant cannot therefore be taken to have acquired a life interest or any interest under it. Where the deviation is on the other side, being rather an imperfect and defective than an excessive execution of the power, the disposition may be held good in equity, and perhaps in some cases at law, though certainly not as a general rule; but an excessive execution of the power is always held to be void at law, and is not allowed to operate even to such an extent as is within the power. In *Roe dem. Brune v. Prideaux* (10 East 187), under a power to lease for 21 years or three lives only, leases were made for 99 years determinable upon three lives; and the court held them bad, being an excessive execution of the power. It was urged that the leases, if not good for the 99 years, might still be good for 21 years, if any of the lives should so long continue; but the court held themselves unable to take that view, observing that no authority had been cited to shew that a court of law had ever held itself entitled to consider such a lease as good in part.

This case, too, is stronger against the appointment than the case would be if a person having power to lease for 21 years only should lease for 99; for here the estate attempted to be created by the second will is of a different character from that directed by the first will, and that has been in many cases held to make the execution of the power more clearly bad.

We are of opinion that the plaintiff is entitled to judgment on the verdict found for him. The cases cited as decided in this court—*Doe dem McIntyre v. McIntyre* (7 U.C. R. 156), *Doe dem. Keeler v. Collins* (Ib. 519),—do not touch the question on which this case turns.

Judgment for plaintiff.

JONES v. HUTTON.

Statute of Limitations.

In an action by an attorney against his client for costs of prosecution it appeared that the claim was barred by the Statute of Limitations, but that the lands of the defendant in the suit had been sold under a *fi. fa.* sued out within six years, and bought in by this defendant, under his own execution.

Held, That this would not revive the claim, by making the defendant accountable to the plaintiff as if he had then received the costs to his own use, but that only the costs of the *fi. fa.* could be recovered.

ASSUMPSIT, brought to recover fees due to the plaintiff, as an attorney. There were common counts in the declaration for work and labor, money had and received, &c., &c.

Pleas—1. Non assumpsit; 2. Non assumpsit infra sex annos; 3. Set off; 4. As to £6 13s. 9d. payment of that sum, which last plea was traversed—Issue on all.

The case was tried at Brockville, in April, 1853, before *Draper, J.* The plaintiff proved his retainer in several suits by the defendant. There was first a suit by Margaret Hutton against John Hobson, which was referred to arbitration in 1841. There was a suit of John Hobson against Margaret Hutton and the defendant, which was referred to arbitration, together with the first suit. Attachments to enforce the award against John Hobson were sued out and put into the sheriff's hands in 1842. In 1843 a suit was brought by Margaret Hutton and the defendant, against John Hobson, founded on the same award. Hobson was sued as an absconding debtor, and judgment was entered against him in November, 1845. Execution against lands was sued out, and at the sale upon this execution the defendant purchased Hobson's lands. The plaintiff's costs, as attorney for the defendants in Hobson's suit against Margaret Hutton and the defendant, were taxed at £8 12s. 9d., about the 20th August, 1842. In the suit of Margaret Hutton against Hobson, the plaintiff's bill was taxed at £15 12s. 10d. The costs of the suit on the award were taxed on the 4th of November, 1845, at £25 2s. 7d., and as between attorney and client they would amount to £28 17s. 8d. The costs of obtaining the attachments to enforce the award were incurred in August, 1842, and amounted to £8 19s. 5d. This action was brought on the 17th March, 1852, and within three years of that time the defendant and plaintiff met more than once, and attempted

a settlement of all these claims, but nothing was actually done. The sale of Hobson's lands, on the execution, took place on the 28th of August, 1848. They were knocked down to the defendant at £60. The fees on this suit were 21s.

It was contended for the plaintiff that the effect of this sale to the defendant was, as between him and the plaintiff, the same as if the defendant had received from Hobson the costs due by this defendant to the plaintiff—*i.e.*, the sums of £15 12s. 10d., and £25 2s. 7d; and therefore, as that was within six years before the bringing of this action, the plaintiff could recover those sums, and the fees on the execution, £1 1s. This view was not adopted by the learned judge, who ruled that all the claim excepting 21s., was barred by the Statute of Limitations. Leave was however reserved to the plaintiff to increase his verdict by these sums, or either of them, if the court should be of a contrary opinion, and the plaintiff had a verdict for 21s.

In Easter term *Richards* obtained a rule nisi accordingly, and in this term *Hagarty*, Q. C., shewed cause, citing *Thurston v. Mills*, 16 East 254; *Standish v. Ross*, 3 Ex. 527; *Brooks v. Bockett*, 9 Q. B. 847; *Scadding v. Eyles*, 9 Q. B. 857.

Richards, contra, insisted that as the *fi. fa.* against lands was sued out within six years, that carried with it the right to recover the previous costs of the action—citing *Harris v. Osbourn*, 2 Cr. & M, 629; *Rothery v. Munnings*, 1 B & Ad. 15; *Griggs v. Meyers*, 6 U. C. R. 532.

ROBINSON, C. J., delivered the judgment of the court.

It appeared that the plaintiff desired at the trial to give in evidence parol admissions of the defendant within six years, such as would formerly have entitled him to recover, but the late statute prevents such evidence from being received and operates retrospectively, as was determined in in this court in *Notman v. Crooks* (10 U. C. R. 105).

Here the plaintiff, being unable to adduce any written promise to pay that would take the case out of the statute, has contended that the fact which was proved, of this defendant having, in 1848, become the purchaser at sheriff's sale of some lands of Hobson, sold upon his own execution, founded

on a judgment which included a recovery of the costs in question, or part of them, he became thereby accountable at that period, which is within six years, to the present plaintiff, to whom the costs were payable, as much as if the land had been bid off by a stranger, who had paid the amount bid into the defendant's hands; but that effect cannot, in our opinion, be given to the purchase made by the defendant.

The reason why the lapse of six years is allowed to bar the remedy for any demand is, that after so long a delay the law assumes the debt to have been discharged. As soon as the attorney had completed his services in each of the matters for which he claims, his right to claim his costs from the present defendant his client, attached, and after six years it will be presumed that he has been satisfied; in which case the costs, whenever paid by the opposite party, would rightly go to the defendant as the client, just as they would have done if he could prove by evidence what we are now bound to assume, that he had satisfied his attorney for those costs.

It is not a matter of costs that an attorney should make no demand upon his client for costs incurred in defending him, or in prosecuting for him; he is not bound to take his chance of collecting them from the opposite party, where the suit or defence has succeeded, and we think in this case we must assume, in the absence of written evidence to the contrary, that this plaintiff has not now any claim upon his client for costs which he could have sued him for eight or ten years ago, and, consequently, that we cannot look upon the costs indirectly received in 1848 as received on account of this plaintiff.

Rule discharged.

O'REILLY V. CORRIE.

Will—Construction of—Estate tail, or fee.

A testator, after devising certain land to his son William, *and his heirs*, "and it is my will and intention that, if the said William should die leaving no legitimate issue, the said two lots to vest and be to the said Walter" (another son) "and his heirs," and &c.—making provision for the estate going to his other sons successively, in case of failure of issue; and if the last-named should die leaving no legitimate issue, then the same to the surviving heirs of my family, in equal proportion."

Held, That William took an estate tail, not a fee, and that a conveyance by him (before the 9th Vic. ch. 11,) was void.

On the 3rd of April, 1812, John O'Reilly made his will, by which he devised to his son William, *and his heirs*, the farm on which he then lived, containing 200 acres, being lots Nos. 77 and 90, in the Township of Stamford, directing that he should not take possession until the testator's wife died, or should marry again—"and it is my will and intention," he added, "that if the said William should die, leaving no legitimate issue, the said two lots, to vest and be to the said Walter" (another son of the testator) "and his heirs, and in case Walter should die, leaving no legitimate issue, the same to vest in said James" (another son) and so on, making the same provision for the estate going to his other sons in succession, in case of failure of issue, "and, if the last-named should die, leaving no legitimate issue, then the same to the surviving heirs of my family, in equal proportions." The testator left a number of daughters.

The plaintiff was the eldest son and heir of William, the first devisee, who died six years ago. The defendant was a person to whom that William O'Reilly, the plaintiff's father, sold and conveyed the land in fee, assuming that he took a fee simple under the general word *heirs*, used in the first of the part of the devise, before the testator proceeded to direct the special limitation of the estate.

At the trial a verdict was taken for the plaintiff, subject to the opinion of the court upon the effect of the will.

Vankoughnet, Q. C., for the plaintiff, cited *Doe dem Neville v. Rivers*, 7 T. R., 276; *Jarman on Wills*, I. 237, and the cases there referred to.

Connor, Q. C., contra, cited *Doe dem. Hanson v. Fyldes*, Cowp. 834; *Cro. Jac.* 427; *Collyer's case*, 6 Co. 16 a; *Cro.*

Eliz. 204, 378, 497; 2 Lev. 249; Doe. dem. Slater v. Slater, 5 T. R. 335.

ROBINSON, C. J., delivered the judgment of the court.

We take it to be too clear for argument that William, the father of the plaintiff, took an estate tail under the will, and that, his interest ceasing at his death, the plaintiff is entitled, as heir in tail, notwithstanding the alienation attempted by his father. The date of the conveyance to the defendant is not given: but as no allusion was made in the argument to our statute 9 Vic. ch. 11, we assume it could have no operation under the facts of the case.

If the deed to the defendant were made after the first of July, 1846, and was registered within six months after its execution, then the entail would be effectually barred, and the defendant's title would be good; unless this will, coming under the term "settlement," according to the interpretation given to that word in the statute, there should be found something in the subsequent clauses of the act which would make the deed given to the defendant insufficient of itself to bar the entail, in case such conveyance had been made after the 1st of July, 1846, which we suppose was not the case, or we should have heard that stated in the argument.

Judgment for plaintiff.

FRANCIS V. BROWN ET AL.

Attaching creditor in Division Court—Rights of, as against other creditors.

Goods in the hands of a Division Court clerk under an attachment, are not protected against an execution issuing from a superior court before the attaching creditor has obtained his judgment.

The sheriff, therefore, is justified in seizing such goods; but *quære*, if the seizure were illegal, whether an action on the case would lie *at the suit of the attaching creditor* against the sheriff and the plaintiff in the execution.

This was admitted to be an action of a novel nature, for which no authority could be found.

The plaintiff, on the 21st of October, had sued out an attachment against one Hutton, an absconding debtor from one of the United Counties of Northumberland and Durham, and soon afterwards obtained judgment and execution in the manner pointed out by the statute 13 & 14 Vic. ch. 53. His

goods had been seized under the writ of attachment, and placed in the charge of the clerk of the Division Court; and before he had obtained his judgment in the Division Court, and while Hutton's goods were thus in the custody of the law, two of the defendants in this action, Brown and Harty, who had obtained a judgment in the court of Queen's Bench against Hutton, sued out a writ of *fi. fa.* against his goods, and placed it in the hands of the other defendant, Ruttan, the sheriff of the said counties; and the plaintiff averred that the three defendants, well knowing the said goods of Hutton to be in the custody of the law under the said attachment, and that they were insufficient to satisfy this plaintiff's debt, and wrongfully intending to injure this plaintiff, wrongfully, unjustly, and injuriously caused the said goods to be seized and taken under color of the said writ of *fi. fa.* out of the custody of the clerk of the Division Court, and to be sold under said writ of *fi. fa.*, by means whereof the plaintiff has been deprived of all benefit and advantage of his judgment and execution in the said Division Court, and the same remains wholly unsatisfied.

The defendants demurred to the declaration. The causes of demurrer, and the statutes bearing upon the question, appear in the judgments.

Richards for the demurrer.

Eccles contra.

ROBINSON, C. J., delivered the judgment of the court.

The first question is—whether, if the goods were illegally taken by the sheriff under the circumstances, this kind of action could be maintained at the suit of the plaintiff in the attachment, for the consequential damage arising to him from his being deprived of the means of obtaining satisfaction of his judgment.

This plaintiff, it seems, could have no other remedy against the defendants; for the goods not being his, nor in his custody, he had not even a special property in them, and so could not have maintained trespass,—though I do not see why the clerk of the Division Court might not have brought such an action, as having a special property. Yet though

this plaintiff could not bring trespass against these defendants, it was admitted in the argument that no instance had been found of a special action on the case having been brought, either in England or here, under similar circumstances, though there must have been frequently the same grounds for such an action. Whenever, for instance, several persons have separate executions against the goods of the same debtor, and one who is not entitled to priority procures the sheriff nevertheless to seize and sell for his benefit, the others, whose writs have been improperly postponed, would have the same grounds for an action on the case against the sheriff and the plaintiff, whose writ had been executed, as the plaintiff had in this case. Still, though no precedent for such an action has been found, I am not prepared to say it would not lie; for though the clerk from whom the goods were taken might sue in trespass, yet the parties who really sustain the injury cannot compel him to sue; and if he should sue and recover damages, they would have a remedy against him, which would be a circuitous mode of obtaining redress. I do not at present see why, if the seizure in this case was illegal, the plaintiff, who is the person really injured, might not support such an action as the present for the consequential damage, unless it be that an action of this nature on the case will not, as a general principle, lie against a person who has merely been asserting his own supposed claim, any more than it will lie against a person for harassing another by a non-bailable action which turns out to be groundless.

It is, however, my opinion that the defendants are entitled to our judgment on the main ground,—that the goods were legally seized by the sheriff, being at the time subject to the *fi. fa.* from this court, which was placed in the sheriff's hands before judgment had been recovered in the Division Court on the attachment suit; though it would have been more satisfactory if the statute which gives the attachment from the Division Court had contained a clear provision on that point. In the first absconding debtors' act, 2 Wm. IV. ch. 5, there is nothing which would expressly allow an execution creditor who had obtained judgment on a suit commenced in the ordinary manner to obtain satisfaction by levying upon goods of

the debtor that had been attached under that act at the suit of some other creditor. The general terms of the act would lead us to suppose that the legislature contemplated the goods after attachment continuing in the hands of the sheriff until the attaching creditor could obtain judgment and execution, yet the operation of that system would be so unjust, as regards creditors who had served their process and were proceeding in the ordinary course, that the legislature, by their act passed three years afterwards, 5 W. IV. c. 5, s. 4, declared that they had no such intention, and expressly enacted that the creditor who should obtain judgment after service of process, and sue out execution before the attaching creditor has obtained his execution, "shall be allowed the full advantage of his legal priority in the same manner as if the estate had not been attached and were remaining in the possession of the debtor."

It is true that the statute 13 & 14 Vic. ch. 53, secs. 64 to 71 inclusive, and sec. 102, contains no such enactment, but much to lead us to the conclusion that the legislature thought only of the goods remaining in the hands of the clerk of the court until the attaching creditor could obtain execution. Still, on the other hand, there is no express enactment that a plaintiff who has obtained his prior judgment and execution in the ordinary way shall lose his priority; and the former statute, 5 W. IV. ch. 5, sec. 4, being declaratory, is an expression of the intention of the legislature that under such circumstances the advantage of priority should not be lost.

And there is also this strong circumstance to be considered—that under this late act, 13 & 14 Vic. ch. 53, attachments may be taken out from the Division Court under circumstances, and on grounds which would not allow a creditor having a large demand to sue out an attachment from any of the courts of record; so that he would be helpless, and must allow the whole advantage to rest with the suitors in the Division Court. The legislature never could have intended this; the remedy of suitors obtaining judgment in the superior courts could not be so defeated without express provision to that effect; and I therefore think that the seizure by the sheriff was in this case legal, and that the defendants are on that ground entitled to judgment on this demurrer.

DRAPER, J.—The first attachment law (2 Wm. IV. ch. 5,) confined the remedy to the Court of Queen's Bench and the District Court, for an obvious reason. The object of the writ was to compel the absconding or concealed debtor to appear and give bail to the action; and this being done (see sec. 2), no further proceeding on the writ itself was had. If bail to the action was not put in, a bond might be given (sec. 3) having the same effect in entitling the debtor to the restoration of his effects. This remedy was, therefore, properly confined to the courts which had the power of issuing process against the person; and the surrender of the debtor on judgment being obtained, would, of course, relieve the special bail, and would also relieve the obligor, who gave a bond under sec. 3.

This act was amended by the 5 W. IV., c. 5, which (sec. 4) enacted, that the plaintiff, in any suit begun by the process therein being served upon the alleged absconding or concealed debtor, before the suing out an attachment against his estate, might continue his suit to judgment; and in case of his obtaining execution before any attaching creditor, he was allowed not merely the full benefit of his legal priority, but he was entitled to any advantage to be derived from the bond (if there were one) taken under sec. 3 of the first act—a provision in his favor going beyond what might have been looked for.

The principle on which those acts were founded—viz., to compel appearance and special bail, or its equivalent, by the bond referred to, and not to hold the property attached if this end was attained—was either entirely overlooked or designedly departed from when the right to attach was extended to the division courts, which have no power of issuing process to hold to bail. The first act for this purpose was the 12th Vic., ch. 69 repealed by, but its provisions incorporated into, the 13th & 14th Vic., ch. 53, under which statute the question arises, which is now for our decision—whether goods attached under a warrant, authorized thereby, are protected from an execution issuing out of any of the superior courts, on a judgment obtained in an action commenced, or even carried to judgment, before

the issuing of such warrant of attachment, such goods being in the custody of the clerk of the division court when the sheriff receives the writ and levies on them.

In order to a clear understanding of the question, the difference between the proceedings authorized in the superior courts and in the division court should be borne in mind. In the former there must be a judge's order; in order to obtain the warrant of attachment, and to procure this the creditor, his servant or agent, must first swear to the debt amounting to £5 or upwards, and further, to the belief that the debtor had left Upper Canada, or is concealed therein, with intent and design to defraud such creditor, and other creditors (if any there be) of their just dues, or to avoid being arrested, or served with process; which departure or concealment shall also be proved by the affidavit of at least two credible witnesses. When the sheriff receives such a writ, he must publish notice of it in the Gazette, &c., and at any time within three calendar months after the first publication the debtor may get back all his property which has been seized by the sheriff, on giving a bond to the creditor suing out the attachment, with sufficient sureties in double the amount claimed, conditioned that the debtor shall not depart from Upper Canada without satisfying such claim, if judgment be recovered against him; or that the obligors will render such debtor to the custody of the sheriff to whom the attachment was directed, or that they will pay the creditor's claim, or the value of the property seized under the attachment. The property attached is only held on default of the debtor's giving such bond, and even if held, a creditor, having commenced a suit in the ordinary manner, and served his writ before the warrant of attachment is sued out, has his legal priority preserved to him; and if the debtor fails to appear and procure his property to be restored to him, so that the creditor gets judgment against him by default, such creditor must prove his demand as if a plea denying it had been put in; and after verdict and judgment he cannot get execution without giving a bond with two sureties in double the sum to be levied, conditioned, if the debtor, within the time and in manner allowed by the act (one year after judgment)

shall succeed in reversing the creditor's recovery, to restore the amount levied with interest, and any further damage occasioned by the seizure and sale of the alleged debtor's property.

In the division courts, if a person, owing any sum not exceeding £25, nor less than 20s., on debt or contract, or on any judgment, *first* shall abscond from Canada, leaving personal property liable to seizure under execution for debt in any county in Upper Canada, (which words would include bank stock, or shares in the capital stock of other incorporated companies : *vide* 2 W. IV., ch. 6, and 12 Vic. ch. 23) ; or, *secondly*, shall attempt to remove his personal property of the description just mentioned, either *out of* Upper Canada, or from one county to another therein, or from Upper to Lower Canada (which would be out of Upper Canada) ; or, *thirdly*, shall keep concealed in any county of Upper Canada to avoid service of process—then any creditor, his servant or agent, may apply to the clerk of any division court of the county *wherein* the debtor was last domiciled, or where the debt was contracted, or to the judge of the county court therein (what does "*therein*" refer to ? I suppose "*wherein*" which precedes, must guide us to the sense) or to any justice of the peace in any county of Upper Canada, and upon making or producing an affidavit of the amount of the debt claimed and that the deponent hath good reason to believe and verily doth believe that the debtor hath absconded from the province, and hath left personal property liable to seizure under execution for debt within the county of — ; *or* that the debtor is about to abscond from this province, or to leave the county of —, with intent and design to defraud the creditor of the said debt, taking away personal estate liable to seizure under execution for debt ; *or* that the debtor is concealed within the county of — to avoid being served with process, with intent and design to defraud the creditor of his said debt ; and negating any vexatious or malicious motive—thereupon such clerk, judge, or justice, may issue a warrant to a bailiff of the court or constable of the county, commanding him to attach, &c., all the personal estate or effects of such debtor, of what nature and kind soever, liable to seizure

under execution for debt within such county, or a sufficient portion to secure the debt with costs, under which the bailiff or constable is to seize. Proceedings in any case commenced by attachment may be conducted to judgment and execution in the division court of the division within which the attachment is issued. When proceedings are commenced before the issuing of an attachment, they may be continued to judgment and execution in the division court where commenced; *and the property seized upon any such attachment* shall be liable to seizure and sale under the execution to be issued on *such* judgment; or the proceeds, if the property be sold as perishable, shall be applied in satisfaction of such judgment. This latter provision, though not very distinctly expressed, means, I presume, that if a creditor commences a suit in the division court, and afterwards obtains an attachment, the suit may go on, and the property seized shall be appropriated in satisfaction of the judgment when obtained. A provision is made for the distribution of the property attached, in case there are several attaching creditors, according to the letter of which only that class of creditors can share in the distribution. All property seized under any attachment is to be forthwith handed over to the clerk of the division court of the division within which the attachment issued. If the debtor, or any person on his behalf, shall, before the recovery of judgment, tender to the attaching creditor a bond, with sufficient sureties, in double the amount claimed, conditioned that the debtor shall, if judgment be given for the claim, pay it, or the value of the property attached, to the creditors, or *produce such property*, whenever thereto required, to satisfy the judgment, then the property attached shall be restored. If within one month after seizure the debtor, or some one for him, do not appear and give such bond, then the creditor getting judgment may issue execution *immediately*, and the property attached, or enough thereof, may be sold to satisfy it, or enough of the proceeds may be so applied if the property has been sold as perishable.

It is plain that, so far as the letter of the statute is concerned, the attaching creditor is placed in a more favorable position under the Division Court Act, than if his attachment

is sued out of any court of record. When once he can get his judgment and execution, his satisfaction is immediate, if the property attached will produce enough; and his recovery is final, though the debtor did not appear and defend, no period being allowed within which the judgment may be revised on a rehearing of the case; and if property is actually attached and delivered to the clerk of the division court, no creditors but such as take out attachment in the division court can come for a ratable satisfaction of their claims. And while the creditor who commences a suit in a division court is allowed to issue an attachment in aid of his suit, and has the advantage thereby secured to him of ensuring satisfaction, no allusion is made to the probability of a creditor having commenced a suit or recovered a judgment in the county court, or in one of the superior courts, against the debtor, although an attachment may issue in the division court, according to the enacting clause of the statute, when the debtor is only removing his personal property from one county to another in Upper Canada. And again, the debtor whose property is attached can only get it restored upon condition, among other alternatives, of producing that self same property, if required, to satisfy the attaching creditor's execution.

This marked difference between the object and the proceeding under the acts for issuing attachments in suits brought in courts of record, and the division courts; the striking distinction between attaching property with the primary object of compelling the debtor to submit his person to the jurisdiction of the court, and attaching it in order to subject it to execution as fast as judgment can be obtained in a court of summary jurisdiction; the absence of a provision in 2 W. IV., ch. 5, to protect plaintiffs in pending suits, followed by the enactments in 5 W. IV., ch. 5, supplying such enactments in a declaratory form; the regulation of the conflicting rights of creditors who sue out attachments in the division courts, while an entire silence is observed as to creditors having demands too large to be within the jurisdiction of the division courts, coupled with the prohibition on plaintiffs to split their demands with a view of obtaining attachments from the inferior tribunals, have (taken together) led me to

think that had the legislature intended by this statute to interfere with and supersede the remedies of creditors suing in the superior courts of record, or with the execution of process against the goods of their debtor against whom they have recovered judgment, they would have been careful to express that intention. I cannot presume that the legislature intended to render nugatory the slower and more expensive proceedings in the superior courts, by the mere issue of a writ of attachment in a division court, or to deprive a creditor to a large amount of the power of recovering anything unless his debtor has lands, until creditors for sums not exceeding £25, who have not commenced their suits till after he had proceeded a long way with his, are satisfied. My opinion is, that it was intended to interpose no obstacle in the way of a creditor using the remedies given in courts of record. If, by the quicker proceeding in the division court, a creditor could obtain the first judgment and execution, he would thereby gain the prior satisfaction, and he might, under fitting circumstances, obtain the aid of an attachment to secure the property not being eloiigned or wasted by the debtor or others. But if an execution from the superior court issues before he can obtain one, then I think the attachment in the court below will not, and in the absence of express provision to that effect ought not to deprive him of his legal priority of execution.

BURNS, J.—I entertain no doubt the plaintiff cannot sustain the present action. If he could, it must be on the principle that when an attachment has issued against the effects of an absconding debtor, according to the provisions of and under the Division Court Act, the goods thereby seized become liable to the attaching creditor, to the exclusion of other creditors who by suits have obtained executions before the attaching creditor could obtain a judgment and execution. There is no expression of words in the act of parliament indicating that it was the will of the Legislature that the attaching creditor should have so much advantage over the non-attaching creditor; but the affirmative of the proposition depends upon the effect of the provisions respecting the duty of the bailiff, and then of the

clerk who is made the deposittee of the goods. The clerk is directed to take the property into his charge and keeping, and the same property is further declared to be liable to seizure and sale under the execution upon such judgment as the attaching creditor may obtain. In this general provision the Legislature must not be understood as dealing with the rights of parties other than the debtor and the attaching creditor. As between *them* the goods should be placed in the the clerk's hands, and as between *them* the goods should be held liable to any execution that the creditor might obtain. In that sense the goods would be under the custody of the law in case the debtor did not avail himself of the provisions for obtaining a return of them upon giving security. If the debtor had obtained a return of the goods, there can, I think, be no question that in his hands they would be liable to be seized upon any execution which another creditor in the meantime should obtain, and if so it could not be pretended that in order to defeat the execution the goods were in the custody of the law. They are no more in the custody of the law because they happen to be deposited with the clerk, as respects other creditors, than if delivered back to the debtor upon security. The property and the right of property is not changed in any way by seizure upon attachment, but it is necessary that the attaching creditor should obtain an execution before the goods can be disposed of.

There are three classes of cases in which attachment may be issued: *First*—Where persons have absconded, leaving personal property liable to seizure under execution for debt. *Secondly*—Where persons attempt to remove property liable to seizure as before, out of Upper Canada, or from one county to another therein, or from Upper to Lower Canada. And *thirdly*—Where persons keep concealed in any county of Upper Canada to avoid service of process. The first and third class contemplate proceedings *in rem* to compel appearance within a month, and if no appearance then the proceedings of the suit go on; but the second class requires proceedings *in personam*, notwithstanding the attachment. It is consistent with both positions to hold the warrant of attachment to be process merely for the benefit of compelling

a defence to a suit, and as between the debtor and attaching creditor property seized under it to be the means of securing it to answer any judgment that may be obtained, leaving the rights of all other parties undisturbed. It would be inconsistent with the proceedings of all other courts, and also inconsistent with the proceedings of suits in the division courts, as far as many plaintiffs might be concerned to hold that in cases of attachments against goods there should be proceedings *in personam*, and still be a lien on the goods, by reason of the attachment, to the exclusion of all other.

An attaching creditor must proceed to judgment and execution, and if there be more than one attaching creditor they are specially provided for; but in the case of an attaching creditor and a non-attaching creditor, as both must proceed to judgment and execution, I apprehend the rule *qui prior est in tempore, potior est in jure*, as respects the execution must prevail, and no lien or priority is gained merely by means of an attachment.

Judgment for defendant on demurrer.

WASHINGTON V. THE TRUSTEES OF SCHOOL NUMBER 14, IN
THE TOWNSHIP OF CHARLOTTEVILLE.

Case, for exclusion from School—Evidence of residence within school section.

Held, that under the evidence in this case it was sufficiently shewn that the plaintiff was a resident of the school section from the school of which his son had been excluded, for which exclusion this action was brought.

The plaintiff sued in case, setting forth that under and by virtue of the statute 13 & 14 Vic. ch. 48, the defendants became and are a corporation under the name of "The Trustees of School Section number 14, in the Township of Charlotteville," in the County of Norfolk, and that it became their duty, as such trustees, to permit all residents in such section between five and twenty-one years of age, to attend the Common School for the school section number 14, as by law established in the township of Charlotteville aforesaid, as long as their conduct should be agreeable to the rules of such school, and so long as the fees or rates required to be paid on their behalf should be duly discharged:—that the defendants had no power to exclude any such resident

from the said school, excepting the children of persons in whose behalf a separate school has been established, according to the nineteenth section of the said statute :—that the plaintiff is one of the class of people called coloured people :—that no separate school for coloured people had been established, as the law in certain cases permits :—yet that the defendants, not regarding their duty, on, viz., the *1st January*, 1851, wholly refused to permit and would not permit one Solomon Washington, the son of the plaintiff, to attend the said common school for the section aforesaid, though often requested, and though he was then and is a resident of school section number 14 as aforesaid, and between five and twenty-one years of age, viz., of the age of twelve years, and though his conduct had been in no way contrary to the rules of the said school, and though the plaintiff was always ready and willing to pay all such fees &c., as should be required to be paid on his said son's behalf :—concluding with the averment that the plaintiff had by such refusal of the defendants lost and been deprived of the benefit of having his son educated at the said school, to his damage of £200.

The defendants pleaded—1st. The general issue, “not guilty.”

2dly. That the plaintiff was not at the said time when, &c., and is not a resident of the said school section.

3dly. That the said Solomon Washington was not, &c., and is not a resident of the said school section.

4thly. A plea justifying the exclusion of the boy, for his alleged bad conduct.

5thly. A plea demurred to.

The plaintiff joined issued on the other pleas.

At the trial it was proved by a witness, who had been a school trustee before and until January, 1851, of what was called and understood to be school section number 14, in Charlotteville, that the plaintiff's son used to attend it, like other children, without any complaint of misconduct that the witness was aware of; that the plaintiff was considered to be resident within the division, and that his land (50 acres) was assessed for the repairs of the school house and for

school fees; that after he had paid the rate, two shillings and sixpence, towards the repair of the school honse, the treasurer returned it to the witness, alleging that the school section did not include the plaintiff's land, but the plaintiff declined taking back the money.—This witness swore that he did not know that the limits of the school section had ever been defined, until after he had ceased to be a trustee in January, 1852; that since that the Township Council of Charlotteville had fixed the limits of the section within that township, which section is composed of part of Charlotteville and part of Woodhouse, a township adjoining. The inhabitants, he said, in his time were anxious to have a school, and got one without reference to any particular limit, and allowed all to attend who chose.

The local superintendent of schools for Charlotteville swore that the plaintiff was considered to be within section number 14; that the trustees for that section received their portion of the government allowance of money, through the witness; that up to 1849 he believed the limits of the section had not been defined (that is, not under the old school act), and that he understood that the section has been since established, including all the rest of the lot of land of which the plaintiff's 50 acres forms part, but excluding his 50 acres.

It was proved by the township clerk of Charlotteville that on the 23rd of September, 1850, two of the school trustees of the section presented a petition to the Municipal Council of Charlotteville, praying that the limits of the school section should be established in such manner as to exclude the plaintiff's 50 acres. This was reported upon by the local superintendent in November, 1850, but nothing was done further by the Municipal Council than adopting that report. This had reference only to the township of Charlotteville.

The township of Woodhouse seemed to have taken part in the proceedings (neither the petition spoken of nor the report were before the court in banc).

In January, 1852, a petition was presented by the plaintiff to the township council, who referred it to the school superintendent, and upon his report the township council

resolved that in their opinion the plaintiff was residing within the school section number 14.

In the fall of 1851, or winter of 1852, some exception seemed to have been taken to the plaintiff's son attending the school, and some of the trustees instructed the teacher not to admit him, or rather told him that if he did, there would be trouble about it, and the school would be broken up. Some doubt was then expressed whether the plaintiff was residing within the section. Ultimately the boy was excluded by the active interference of one of the trustees.

The schoolsuperintendent stated, that he understood from the trustees that they intended to be guided by the limits of the section as prayed for by the trustees in 1850 ; that is excluding the plaintiff's 50 acres; which they seemed to think had been confirmed and established by the council.

Upon this evidence a nonsuit was moved for, on the ground that the plaintiff had not proved that any limits for school section number 14 had been legally established ; that being composed of part of two townships—a union school section under the 18th section of the act 13 & 14 Vic. ch. 48—the limits could only be defined by the reeves of the two townships and the local superintendents within the two townships ; that no limits had been so defined ; and that the receipt of school moneys from the township superintendent of Charlotteville could not have the effect of establishing any definite limits to the section.

The learned judge concurred in those objections, and a nonsuit was ordered, which *Galt* moved to set aside.

McMichael shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that this rule should be made absolute.

It appears that there was a school section understood to be established in the township of Camden, called section 14; that trustees were appointed for it, who established and opened a school, received and applied public moneys for the teacher of the school in that section, and assessed this plaintiff as well as others for its support.

Under these circumstances it cannot lie in their mouths

to say that there is not, and has not been any such section; and besides, they do not by their pleas deny the existence of such a section; on the contrary, they admit it, but deny that the plaintiff was a resident within it. They admit him however, to be resident within the section when they rated him for the purposes of the school, and for a time his son was received and taught there; but afterwards it seems they desired to exclude him, and, as it appears, very unfairly, by procuring the municipal council to settle new limits for the school, which should exclude the 50 acres on which the plaintiff was living from the section, although the rest of the same lot and the lands around them were within it, and although he would by such an arrangement be shut out from all the schools of the township, for he would certainly be within no section. It appears however from the evidence that the municipal council did not make that arrangement, at least not in such a manner as the law requires; and the plaintiff, when his son was rejected, or, indeed, expelled, stood in the same relation with respect to this school as every other person did whose children attended it. No separate school had been established for the coloured population in that part of the country, and therefore there could be no question about the plaintiff being confined to any such separate school.

The legislature does seem to have meant, though reluctantly, to give way so far to any prejudices that may exist in the minds of the white inhabitants, as to allow of the establishment of separate schools for the coloured people, if thought expedient, but not so far as to consent to shut them out from the only public schools that do exist, by leaving it discretionary in the school trustees to deny admission to them arbitrarily, when they have no other school to go to.

Rule absolute, without costs.

IN RE DENNIS HILL V. THE SCHOOL TRUSTEES OF CAMDEN AND ZONE.

Coloured people—Separate schools—12 Vic. ch. 83: 13 § 14 Vic. ch. 48.

Residents of a school section in which a separate school has been established for the class to which they belong—as in this case, for coloured people—not entitled to send their children to the general common school of such section.

Duck obtained a rule nisi to shew cause why a writ of mandamus should not issue, to compel the defendants to admit to the common school of the school section No. 3, in the united townships of Camden and Zone, Francis and Rowland Hill, children of Dennis Hill.

Hill made affidavit that he is a negro, and an inhabitant and freeholder of the township of Camden, and liable to be assessed, &c., and paying assessments; that he has continually resided in Camden for the last nineteen months, and still lives there with his family; that the children above named are his, Rowland being twelve years old, and Francis seven and upwards; that he lives with his children within school section No. 3, and has done so for nineteen months, and "*has applied*" to the said trustees (naming them) for permission to have his children taught in the common school for the section, but that they have refused, and still refuse to permit either of his children to attend the said school; that on the 9th of April, 1853, he demanded of two of the three trustees (naming them) to allow his children to attend and be taught in the school, and that they then refused, though he took his children then with him to the said school for admission, and that the teacher also refused to teach or to receive the said children; that on the 17th of May, 1853, he demanded of the third trustee to permit his children to attend, and was refused; that all the trustees still persist in their refusal on account of his children being coloured or negro children; that there is no separate school for coloured children in the said section; and that the nearest school of that description is in section No. 12, distant four-and-a-half miles from his residence; that he has taken the oath of allegiance, and has been a resident in Upper Canada for the last eleven years.

This affidavit of Hill was confirmed in all material points by an affidavit of one George Carey.

In opposition to the application it was shewn, that since the 1st of January, 1852, there has been, and still is a common school established and kept open at the British American Institute, in the gore of Camden, in the united townships of Camden and Zone, for the exclusive benefit of the

coloured population in the township of Camden, under a by-law passed by the municipal council of the gore of Camden on the 8th of February, 1850; and an affidavit was filed, made by the gentleman who was local superintendent of common schools for the united townships of Zone and Camden for 1850-1-2, to the effect that he received from the clerk of the council of the united townships a copy of the by-law passed for dividing the united townships into school sections; that early in 1850 he received the report of the chairman of the meeting convened to elect school trustees for the separate school sections, and stating who were the three trustees chosen; that he paid to their order the money apportioned to the school sections for 1851-2; and that, although he was not local superintendent for 1853, yet he had good reason to believe that a school was in operation for the said separate school sections for that year.

By the by-law passed on the 9th of February, 1850, dividing the *township and gore* of Camden into school sections (under the Act 12 Vic., chap. 83, then in force), it was provided as follows:—"And whereas, according to the School Act 12 Vic. chap. 83, the establishment of separate schools for the education of the coloured population is authorized, be it enacted that one school for the education of the population of coloured persons *in the said township and gore of Camden* shall be, and the same is hereby established, and the site thereof directed to be fixed at or near the British American Institute in the said gore of Camden; and George Carey is hereby appointed and required to call the first school meeting of the coloured population of the said township and gore of Camden."

After this by-law was passed, the township and gore of Camden were united to the township of Zone, and all are now called the united townships of Camden and Zone; and it was sworn that school section No. 3, mentioned in this application, is the same school section No. 3 mentioned in the by-law as in the township and gore of Camden, (being confined, however, to land in the gore).

It was stated in one of the affidavits that the deponent had no doubt that the establishment of the separate school in question was owing to the prejudice known by the

council to exist among the white inhabitants against having their children attend in the same schools with the coloured children.

Read shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

On examining the school acts, we have no doubt that it was intended by the Legislature, when they passed the statute 12 Vic. ch. 83, that if a separate school should be established for coloured people under the 69th, 70th, and 71st clauses of that act, the children of people of colour residing within such section should be educated within such separate school. The reason recited for the enactment in the 69th clause leads strongly we think to that conclusion; and the provision in the 70th clause, respecting the paying over for the support of the teachers of such separate schools whatever amount of school rates may have been collected from coloured people, supports that construction. But in April, 1853, when Hill demanded to have his children admitted to the common school of school section No. 3 (within which section he resides) the statute 12 Vic. ch. 83 was no longer in force, though it was in force when the by-law was passed, and it was under the authority given by the ch. 83 that this separate school was established.

We must consider then whether any and what change had been made by the subsequent School Act, 13 & 14 Vic. ch. 48, which was the law in force when the trustees refused, in April and May, 1853, to receive the children of Hill.

The first section of that act provides that the repeal of the former law—*i. e.*, 12 Vic. ch. 83—shall not extend to “*any act done*” or any proceeding had under that law, and “*that all school sections, or other school divisions, together with all elections and appointments to office, all agreements contracts, assessments and rate bills, made under the authority of the said acts or of any preceding acts, and not annulled by the said acts or by this act, shall be valid and in full force, and binding upon all parties concerned, as if made under the authority of this act.*” (13 & 14 Vic. ch. 48), “*and shall so continue until altered, modified, or suspended according to the provisions of this act.*”

It does not appear that since this act was passed anything has been done or enacted under it by the municipal council of the townships of Camden and Zone, or of Camden and Camden Gore, in relation to this separate school that had been already established ; and the 19th clause of this statute, 13 & 14 Vic. ch. 48, is confined in its operation to such separate schools as might be established *under that act*, and does not affect separate schools that had been established under the former law of 12 Vic. ch. 83, and that were suffered, like this separate school to continue without any special provision having been made under the new act respecting it.

But the 12th clause of this statute, 13 & 14 Vic. ch. 48, sub-sec. 13, has a strong bearing upon the question before us, for it provides that it "shall be the duty of the trustees of each school section to permit all residents in such section between the ages of five and twenty-one years to attend the school, * * * provided always that this requirement *shall not extend to the children of persons in whose behalf a separate school shall have been established according to the nineteenth section of that act.*" This shews that the Legislature did not intend at that time that separate schools should be resorted to or not, according to the choice of the persons *in whose behalf* they should be established, by which I understand not merely the applicants for the school, but those belonging to *the class of persons* in whose behalf the separate school had been established.

The last School Act. 16 Vic. ch. 185, being passed after the demand was made which gives rise to this application can have no direct effect upon the question respecting the right of this applicant at the time of such demand, or at least not without express words giving it such operation ; but we have referred to it to see whether it can assist in explaining what was probably intended by the former acts. It is the 4th clause of this last statute which relates to the subject of separate schools, and it seems to us that this clause relates only to separate schools established or intended to be established on account of a difference of religion. It makes no mention of separate schools for coloured people ; but if

it can be extended to them consistently with its language, still we do not see that it would affect the question now before us.

Upon a review of the several statutes, we are of opinion that the separate schools for coloured people were authorized as the defendants have suggested out of deference to the prejudices of the white population—prejudices which the Legislature evidently, from the language which they used, disapproved of and regretted, and which arise, perhaps, not so much from the mere fact of difference of colour, as from an apprehension that the children of the coloured people, many of whom have but lately escaped from a state of slavery may be, in respect to morals and habits unfortunately worse trained than the white children are in general, and that their children might suffer from the effects of bad example. It can hardly be supposed that the Legislature authorized such separate schools under the idea that it would be more beneficial or agreeable to the coloured people to have their children taught separately from the whites. They recite in the 69th clause that the ignorant prejudices of the whites had prevented the children of coloured parents being received in the common schools as the law stood; and in order that they might be educated, and without intending, as we think, to disregard and over-rule the objections of the whites, they provided that the municipal council of any township might in their discretion establish separate schools for the coloured population, and this too, it is material to remark, without being moved to do so, as in the case of separate schools for Roman Catholics and Protestants by an application from the class of persons whose children were to be taught in such separate schools.

After the establishment of any such separate school in a division, we do not think a choice was intended by the Legislature to be left to the coloured people within that division to send their children nevertheless to the general common school, because that would defeat what we take to have been the intention of the provision, and it would besides have been inconsistent with the 70th clause of 12 Vic. ch. 83, which directed that the school rates raised upon the coloured

population in any such division should go to the support of such separate school ; and we think the 13th sub-section of the 12th section of 13 & 14 Vic. ch. 48, shews that the Legislature did not mean that it should be imperative on school trustees to receive in the general school for the division the children belonging to a class in whose behalf (or for whom) a separate school should have been established, nor do we see in any of the statutes an indication of a contrary intention.

We therefore abstain from issuing a mandamus, which can never be done in a doubtful case ; and if it should be thought that we have misinterpreted the intention of the Legislature it will be easy so to modify the law in that respect as to make the point clear.

Rule discharged.

THOMAS V. CROOKS.

Defective title—Sale by agent—Assumpsit against him to recover back the purchase money, not maintainable under the facts.

When on a sale of land there has been a conveyance perfected unless fraudulent mis-statement or concealment are clearly made out, there can be no action except on the covenants, and where there are no covenants, or none that will extend to the cause of eviction, there can be no action against the vendor.

Semble, that where fraud is established, but the conveyance has been made, and the parties cannot be placed in *statu quo*, then the remedy is by an action for deceit ; and assumpsit for money had and received, to recover the purchase money, will not lie.

Held, that on the evidence set out below, the defendant was not shewn to have been guilty of fraudulent misrepresentation or concealment of title. In this case the defendant was not the person who conveyed the land or had the beneficial interest. He acted in making the sale, and received the moneys, merely as agent for the trustees of his wife and his wife's sister, and before action brought he had paid it over.

Quære—Whether under these circumstances an action would lie against him, or whether the principal should not have been sued, so that he might defend his own title.

This was an action on the common count for money had and received to the plaintiff's use, to which the defendant pleaded non-assumpsit.

At the trial, before *Burns, J.*, at the last assizes held at Cobourg, the facts of the case were these :—Certain lands, namely, Lot 17 in the 8th concession, Lot 7 in 9th concession, and 100 acres of lot 7 in the 10th concession, of the township of Haldimand, had been conveyed by W. L. Fair-

field and wife, many years since, to Mr. David Torrance, one of the executors of the estate of Daniel Fisher, late of Montreal, to satisfy a debt due from Mr. Fairfield to Mr. Fisher. The co-heiresses of Daniel Fisher are Mrs. Crooks, the wife of the defendant, and her sister, Mrs. Willoughby; and they had commenced a suit against the executors of the estate in Chancery, for the purpose of winding up the affairs of the estate and other matters connected with the administration of the assets. This suit was settled in the year 1848, but the title to the lands in question was left standing in Mr. Torrance to be transferred by him in such manner as should at a future period be directed. Mrs. Crooks's property was vested in trustees, for whom the defendant acted as agent, and he also acted as the agent for Mrs. Willoughby. In March and April, 1849, a correspondence took place on the part of the plaintiff, and with the defendant, for the purchase of one of the lots. It was ultimately sold by the defendant to the plaintiff, and Mr. Torrance executed a conveyance, but without covenants for title, and the plaintiff took no covenants for title from any one. Subsequently the plaintiff purchased the remainder of the lands, and a title in like manner was taken from Mr. Torrance. He being a trustee of the property would not covenant for title. The plaintiff paid a portion of the purchase money, and to secure the residue executed two several mortgages upon the lands to the defendant in his own name, and not representing him as either an agent or trustee in any manner. The amount of these mortgages were duly paid to the defendant. The first was executed in July, 1849, to secure the sum of £150, and the second on the 9th of April, 1850, to secure the sum of £152 10s. It was proved that the whole of the share of the purchase money due to Mrs. Willoughby had been paid over to her, and the share belonging to Mrs. Crooks had been accounted for to her trustees. In the year 1852 a person of the name of John B. George brought an action of ejectment against the plaintiff for the lands in question, upon a title paramount to that of David Torrance, and recovered the possession. The plaintiff then brought the present action to recover back the purchase money and interest, on the ground that the consid-

eration for the contract had entirely failed. The plaintiff, after the purchase, had occupied the lands until he was ejected therefrom by the action mentioned. The defendant was examined by the plaintiff, and he stated that he was not aware of any person making any claim to the lands in question until after the sale and conveyance to the plaintiff, and a good deal of correspondence that passed between the parties was proved. Mr. Torrance proved that in the year 1845 or 1846 he had been informed by Mr. Kirkpatrick, at Kingston, that there was a defect in the title of these lands, and that other parties claimed besides the person from whom the conveyance came to him, and he stated that he afterwards informed the defendant of the information he had received, and that he thought the defendant was aware, when he sold to the plaintiff, that there was a defect.

It is not material to this case to shew more of the correspondence than two letters written by the defendant to the plaintiff's agent. The first dated 5th April, 1849, was as follows:—"I received your letter of the 2nd instant, respecting Lots 17 in the 8th concession, and 7 in the 10th concession of Haldimand, and will accept both proposals at interest from this date. In the first case I have the patent from the Crown to Daniel Jackson, and deed from W. J. Fairfield and wife to David Torrance of Montreal, who will convey to James Thomas the purchaser, and upon payment of the £25 down, I will take a mortgage to secure the balance of the purchase money, say £125, and interest from this date. Lot No. 7 in the 10th concession consists of 150 acres, for which I will take 15s. per acre, payable as you mention; £15 down, and the residue in equal annual instalments with interest from this date. I have the patent to Thomas Jackson, and this lot is included in the above deed, Fairfield and wife to Mr. Torrance, who will make the conveyance. Write to me to say whether I am to send the deeds to be executed to Montreal." The second letter was dated 11th April, 1849, and was as follows:—"I received your letter of yesterday this morning, and in reply beg to say that the reason I wish the title direct from David Torrance is because of our marriage settlements, which would occasion our trustees being parties

to the deeds if David Torrance conveyed to us. Independent of the expense, it would have a tendency to burthen the title. In fact as it now is Mr. D. Torrance has the estate, and the simple matter would be to get a conveyance from him to the purchasers direct. But if after this you wish it, we will get the conveyance to our trustees and from them to the purchasers. I enclose you a description of the two lots in the 9th and 10th concessions, which shews that they each contain 150 acres; there, therefore, must be some mistake about it. I have the patent, and it is as enclosed."

Reference was claimed at the trial, if necessary to understand the question raised in this case, or the position the respective parties occupied, to the facts and evidence in the case of *George v. Thomas*, tried at Cobourg^d at the autumn assizes of 1852. (See 10 U. C. R. 604.)

On these facts the defendant urged at the trial that he was not liable:—

1st.—Because he acted merely as an agent in the transaction, on behalf of other parties, and derived no personal benefit.

2ndly—Because an action of assumpsit will not lie as for money had and received upon a failure of title in the case of sale of lands.

3rdly—That the plaintiff was estopped from contending that the title was defective, after he had executed mortgages upon the same lands to the defendant.

4thly—That under no circumstances, unless fraud be charged and proved, will an action lie to recover back the purchase money on the sale of lands, and especially when the person selling does not himself convey.

For the purpose of preventing further litigation between the parties, the learned judge submitted to the jury the following questions:—

1st—Was the defendant aware, when he sold to the plaintiff, that the title to the lands in question was defective?

2ndly—Did the defendant inform the plaintiff, at the time of the purchase, that there was any defect in the title?

3rdly—Did the defendant conceal anything respecting the title from the plaintiff at the time of the purchase?

4thly—Was the plaintiff aware, at the time of the purchase, that the defendant was acting as an agent for other parties as he contended he was ?

It was explained to the jury that the concealment intended was of something of which the defendant had knowledge, and which he intentionally did not communicate to the plaintiff.

To these questions the jury replied that the defendant was aware, when he sold to the plaintiff, that the title was defective, and did not inform the plaintiff of any defect in the title, but concealed from the plaintiff the knowledge he had. The jury further answered to the last question that the plaintiff was not aware that the defendant acted as an agent in the transaction.

Upon this finding a verdict was directed to be entered for the plaintiff, for the amount of the purchase money and interest, and leave was reserved to the defendant to move the court to set aside the verdict and enter a nonsuit.

Adam Crooks obtained a rule to enter a nonsuit, for or a new trial on the law and evidence, and for misdirection.

Wilson, Q. C., shewed cause.

The authorities cited are noticed in the judgments.

ROBINSON, C. J.—We have to consider whether the rule should be made absolute for a nonsuit or for a new trial. The conduct of the plaintiff seems to have been perfectly fair throughout. He paid for the land what was accepted and considered as its value. He has lost his land by judgment of a court, after doing what he could to defend himself, and he has lost it, because it has turned out that the person who sold the land to him,—whether we look upon this defendant or Mr. Torrance as the seller, or the trustees,—had no title to it. He asks in consequence to get back his purchase money, and if he should not be successful in reclaiming it in this action, and should be found to have no other means of redress either at law or equity, his case would seem a hard one ; though even in that case he must consider that when a man buys an estate, and neither searches nor enquires into the title, nor takes care to have a covenant

from the seller that will secure him in case of any defect, he acts very rashly, and has no very good reason to find fault with the law if he suffers from his neglect of such ordinary caution. What the seller in such a case may feel himself bound in honor and good conscience to do, is a consideration that in many such cases must be left to himself. This court can do no more than give to the purchaser whatever remedy he is legally entitled to under the facts of his particular case.

The result of this action, if it will be unfavourable to the plaintiff, would determine nothing more than that he cannot recover against this defendant in such an action as he has brought. It would not necessarily establish that he is without remedy either at law or in equity against the defendant or against some other party. It may be, however, that the grounds on which we must dispose of the case may be such as to shew that, according to our present opinion there is no remedy to be had by the plaintiff in a court of law. Whether there would be any redress obtained in equity is a point on which we need not, and in general ought not to express an opinion.

In my opinion the verdict given for the plaintiff in this case cannot be sustained without violating acknowledged principles of law.

It cannot be said here, as in *Bree v. Holback* (Doug. 655), and *Johnson v. Johnson* (3 B. & P. 170), that no conveyance has been made to the plaintiff, and that he paid his money upon an agreement merely for an expected consideration, which has wholly failed. A deed was made to him of the land, and by a person who, being a trustee merely, would give no covenants. He might have insisted on covenants, but of course was at liberty to waive them. If he had taken a deed with ordinary covenants, they would, according to the common usage, have been restricted to acts done or suffered by the grantor, and would have left the plaintiff still under the necessity of satisfying himself in regard to the title of the persons from whom the grantor had received a conveyance. In *Cripps v. Reade* (6 T. R. 606) Lord Kenyon said, "I do not wish to disturb the rule of *caveat emptor* adopted

in Bree v. Holbeck and in other cases, where a regular conveyance was made, to which other covenants were not to be added, for in general the seller only covenants for his own acts and those of his ancestor."

Bree v. Holbeck was a strong case in favor of the party suing, for there an administrator of an estate with a will annexed, finding a mortgage deed among the papers of the testator, and supposing it to be genuine, parted with it *bonâ fide*. It was afterwards discovered to be a forgery, and the assignee sued the administrator in assumpsit for money had and received, in order to get back the money he had paid; but the court held he could not recover back his money unless he could support a charge of fraud by shewing that the administrator before he sold, had discovered the forgery. He did not covenant, Lord Mansfield said, for the goodness of the title, but only that neither he nor the testator had incumbered the estate. It was incumbent on the plaintiff to look to the goodness of it. So in Johnson v. Johnston, (3 B. & P. 170), which in several of its circumstances resembles this case, Lord Alvanley observed, "We by no means wish to be understood to intimate that where under a contract of sale a vendor does legally convey all the title which is in him, and that title turns out to be defective, the purchaser can sue the vendor in an action for money had and received. Every purchaser may protect his purchase by proper covenants; where the vendor's title is actually conveyed to the purchaser, the rule of *caveat emptor* applies." In that case, as in Cripps v. Reade, the action for money had and received, was sustained because there had been no conveyance, and the money had been paid only upon an agreement in contemplation of a deed being made, which was not in fact executed.

It is quite clear that where the court in the cases determine that the money cannot be reclaimed where the seller has actually conveyed all the title that he had, they mean the observation to extend to cases where there was, as in the present case, an entire want of title, and not merely where there was some flaw or imperfection which still admitted of something passing under the deed. In Bree v. Holbeck, the deed under which the defendant assumed he was entitled,

was forged, so that there could be no case of a title more utterly worthless, and of a more complete failure of consideration. That case was at least as strong as the present; and so would the case of *Johnson v. Johnson*, have been if a conveyance had been executed by all the intended grantors, and on that account the court had determined against the action, as it is plain they would have done, though nothing would have passed to the vendees under the deed.

In the 2nd section of the 12th chapter of Lord St. Leonards' work on vendors and purchasers, this subject is extensively discussed, and he expressly notices that it is immaterial that the seller who has given a conveyance, had no interest whatever to transfer; that the vendee will be unable in case of eviction, to recover back his purchase money, it being incumbent on him to look to the goodness of his title, where he has taken no covenants that will secure him; and he takes the case clearly to be, "that if the conveyance has been actually executed by all the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend (which is the present case in effect, for it seems in *Thomas's deed*, there was no covenant at all), he cannot recover the purchase money either at law or in equity"—(2nd vol. 10th ed. p. 420). "If a purchaser," he says again, (p. 426), "neglect to look into the title, it will be considered as his own folly, and he can have no relief." He re-states this principle in the same volume, (p. 537), with a qualification, when he says, "Unless the eviction be within the covenant, or there was a fraudulent concealment of the defect, a purchaser cannot recover the purchase-money in case of eviction, either at law or in equity." And it appears from a note in this work (p. 424), that in this respect the law of Scotland is the same.

The case of *Serjeant Maynard*, (2 Freem. 1), and an anonymous case, (2 Freem. 106), are referred to by the learned author, and they are both very material, and especially the last, because it turns upon the ground of alleged misrepresentation or concealment, on which this action is attempted to be supported. In *Goodtitle v. Morgan* (1 T. R. 762), it is said by Mr. Justice Ashhurst, "No man ought to

be so absurd as to make a purchase without looking at the title deeds; if he is, he must take the consequences of his own negligence.

The case of *Hitchcock v. Giddings*, (4 Price 135), seems at variance, so far as regards the language of the court in giving judgment, with what has been laid down in these and many other cases; but it has been treated by Lord Eldon as of doubtful authority, and Lord St. Leonards seems evidently to dissent from the principles laid down in that judgment, though when the facts of that case are carefully considered it will be seen clearly to stand upon peculiar ground, which may account satisfactorily for the decision.

Upon the whole it seems quite clear that where there has been a conveyance perfected, unless fraudulent mis-statement or concealment can be made plainly to appear, there can be no action except upon the covenants, and where there are no covenants, or none that will extend to the cause of eviction, there can be no action against the vendor. Now in regard to the ground of fraud in this case, if all that was stated in evidence in that respect on the plaintiff's part were fully credited, and no attention paid to the defendant's solemn declaration on oath, when called, as he was, on the part of the plaintiff, that he knew nothing of any defect in the title when he sold the land; and if, taking the evidence on that footing, we should consider that it establishes frauds within the meaning of the principle I have stated, we should still have several preliminary difficulties to dispose of.

1st.—If this defendant had even been to the fullest extent the principal in the transaction, having executed the conveyance himself and received the purchase money for his own benefit, should not the action have been brought for deceit rather than for money had and received to reclaim the purchase money? *Bree v. Holbeck* is not an authority to the contrary, because the transaction there was the mere assignment of a mortgage. It did not appear that the vendee of the mortgage term had gone into possession, or was entitled to do so, and, if not, the parties could be placed in *statu quo* by the purchase money being returned. Besides, an alleged fraud was specially stated

on the record in the replication, and the court did not uphold the action, so that there was no occasion to consider whether that was a proper form of action under the circumstances.

In *Early v. Garret*, (9 B. & C. 929), it does not appear that a conveyance had been executed, or that the vendee ever went into possession, or enjoyed any advantage from his purchase. On the contrary, it appears from the case stated, I think, to have been otherwise, so that the return of the purchase money would place the parties in *statu quo*; and besides, in that case the verdict for the defendant was upheld, and there was no occasion to discuss the propriety of suing in assumpsit.

In Mr. Butler's note to Co. Lit. 384, a note 1, he states that "where the seller conceals from the purchaser the instrument or the fact which occasions the defect, it is a fraud, and the purchaser *has the remedy of an action on the case, in the nature of an action of deceit.*" I am inclined to think this the only remedy suited to a case like the present, even where there has been fraud in the seller. Where there has been a contract of sale only and no conveyance, and the plaintiff sues for his deposit, assumpsit for money had and received is the common remedy, but here the plaintiff received possession of the lands and held them for a considerable time, two or three years, and I believe had sold a part. The parties cannot be placed in *statu quo*, and the remedy, I am disposed to think, is a special action for such damages as the jury may think right to give, which might be more even than the purchase money and interest; however, if the case turned upon that point, I should desire to consider it further.

Then there is the further difficulty that this defendant was not the person who conveyed the land, nor the person who had held the beneficial interest, and that he only received the money as agent for his wife's trustees and for Mrs. Willoughby, and before this action was brought, had actually paid it over. No doubt there are many cases in which it has been held that, when an agent gets money into his hands by his own illegal act, he cannot discharge himself from liability by paying it over to his principal; but I

take those cases to be very distinguishable from the present. It cannot be said here that this was money exacted contrary to law; the facts do not bring it within that class of cases. If Armour is to be regarded as acting for the plaintiff in making the purchase—which he seems clearly to have been—then the correspondence shews that he knew the defendant to be acting for the trustees.

There is still the further consideration that this was a transaction respecting the sale by the defendant of real property in which other parties were beneficially interested; and it is a general principle in such cases that the title cannot be tried incidentally in an action against the agent who received the money, but that the principal, and not the agent, must in such cases be sued. If anything could take a case out of that principle, it must, as I take it, be a fraud of a very different character from anything that there is a pretence for imputing to this defendant upon the evidence. An agent selling land and receiving the money, is bound to pay it over to his principal. He cannot retain it and set up a *jus tertii*, and it is proper that the principal should be the person attacked, that he may defend his title.

But—putting aside all the peculiarities of the present case, and any questions which might be raised upon them, it is clear that the plaintiff, having received a conveyance of the land, could not support an action on the count for money had and received to recover back the purchase money, without plain proof of fraudulent misrepresentation, or of fraudulent concealment of some particular circumstance known to him, which had the effect of making the title worthless. Now there could scarcely be imagined a case more free from the least appearance of inveigling a party into a purchase. The plaintiff was not sought by the defendant; it was he who sought the defendant. Having learned that he had authority to sell this land, he makes a proposition to him through Mr. Armour. The defendant accepts his offer and his terms, and states candidly in his answer all the title-deeds which he had in his possession—namely, the patents to David and Thomas Jackson, and a deed of bargain and sale from W. and J. Fairfield and wife to David Torrance; and he stated that Torrance, who held

the title, would make a conveyance. It would naturally occur to any careful person to ask what title Fairfield and wife had to convey, as no deed was stated to be forthcoming from either of the patentees to Fairfield or his wife. The defendant did not take upon himself to attempt to explain this, or even to offer any conjecture upon the subject; he stated only the fact so far as it was known to him. If he had stated that there had been conveyances from the patentees, which were lost, but that their existence and contents could be proved, that would have been a fraudulent representation; but there was nothing of the kind. How either the defendant or the plaintiff accounted in his own mind for the want of any apparent connection between the patentees and the Fairfields, or whether either of them thought it worth while to inquire, does not appear. The probability is, that both were content to take it for granted that Mr. Torrance, when he took the deed in 1829, must have been satisfied of the right of the Fairfields to make it; and no one else having come forward as owner in so long a time as had elapsed since he took it, may have made both equally confident that all was right. It is not proved that any assurance was given by the defendant on the subject, or that he ventured to state anything which has been since disproved. It may have been assumed by the plaintiff or defendant, or both of them, that Fairfield's wife had succeeded to the property as heiress, which would account for the absence of any conveyance from the Jacksons. It does not appear from the evidence whether in the deed to Torrance, she was described as heir or devisee of either of the Jacksons, or in what capacity she was a party. The deed must, I suppose, have shewn, by the certificate indorsed on it, if not otherwise, that the estate was conveyed as hers.

One witness, it is true, swore that he heard the defendant say to the plaintiff that they had been twenty years in possession; but that was after the conveyance, and after payments had been made; and as the plaintiff had lived near the lots and knew them, he could only understand, what we must necessarily suppose the defendant to have here meant, that more than twenty years had elapsed since Torrance took the

conveyance, which would give him constructive possession, and that no one had come forward to dispute such possession.

Then as to the concealment of any fact known to the defendant, there can scarcely be said to have been any more proof of that than there was of any fraudulent misrepresentation. Mr. Torrance in his evidence, says he believes he told the defendant before he sold the land that there was a defect in the title. His own letter to Mr. Armour, shews that he could have meant nothing more than the defendant already knew and had stated—that there was a defect in the proof of the chain of title, not that the title was in fact invalid. There was nothing specific in the information ; no particular fact stated by him to the defendant, which the defendant fraudulently concealed. He says in effect nothing more than that *he believes* Mr. Crooks was aware before the sale of that which the defendant did himself state to Mr. Armour—namely, that there was an apparent break in the title, something obscure or unaccounted for, but nothing known to be in fact wrong, further than the absence of a deed, about which it was as much incumbent upon the buyer as the seller, to make inquiry before he closed his purchase.

Upon such evidence, to say nothing of the defendant's positive denial upon oath, when called by the plaintiff, that he knew of any defect in the title, it is impossible, in my opinion, to support a verdict for recovering back the purchase money as upon a fraudulent concealment; and I think therefore, that on this ground, independently of any other objection, the plaintiff should have been nonsuited.

BURNS, J.—It is not necessary to decide this case upon the question whether the defendant be liable on the ground of not having disclosed the fact that he acted merely as an agent for other parties, or upon the ground that an action in the form of money, had and received, would not lie.

If the case depended upon these questions only, I should be disposed to agree with the defendant. In the case of *Fuller v. Wilson*, 3 Q. B. 58, the court held that, whether there was moral fraud or not, if the purchaser was actually deceived in his bargain, the law will relieve him from it. They thought the principal and his agent were for this purpose completely identified, and that the question was not

what was passing in the minds of either, but whether the purchaser was in fact deceived by them or either of them. Whether the defendant did or not apprize the plaintiff that he was acting as agent when making the contract for the sale of the lands, doing it, as the letters shew he did, in his own name, would be of little consequence under the plea of *non-assumpsit* merely. Vide *Jones v. Little-dale*, 6 A. & E. 486; *Higgins et al. v. Senior*, 8 M. & W. 834. Whether the plaintiff can, under the circumstances, maintain an action for money had and received, may be disposed of by this view, and this consideration of the case. The true test whether this form of action can or not be sustained, is whether the parties can be placed in *statu quo*, as before the contract. The leading authority upon this point is *Hunt v. Silk*, 5 East. 449, and since that decision, the case of *Reed v. Blandford*, 2 Y. & J. 278. The distinguishing feature between those cases and the present, and the principle upon which the action depends, is, that the contract is to be rescinded upon some matter occurring between the parties themselves to the contract, or by the act of one of them, and then the question is whether the parties by rescinding the contract, can be placed in *statu quo*. In the present case, and cases of a similar description, the contract is not rescinded in the sense in which it confers a right to maintain an action for money had and received, but the contract is destroyed and completely nullified by matter beyond and without the control of the parties to the contract, or either of them. The plaintiff, it is true, derives a benefit or advantage from the possession of the property transferred to him, but then he is liable to account for that to the true owner, whose title is paramount to that of both the parties to the contract. This form of action was adopted in *Bree v. Holbeck*, Dougl. 655, and *Early v. Garret*, 9 B. & C. 928, without being questioned. The facts of the present case would not, however, seem to support the form of the action.

The main question, however, is whether under the circumstances of this case, the defendant be liable to the plaintiff on the ground of fraud, or what is equivalent to it, being practised upon the plaintiff. There can be no question that in the absence of fraud, and where the purchaser has taken

no covenants to secure the title, he has no remedy for his money when there is a failure of title. Lord Eldon observed in *Hiern v. Mill* (13 Ves. 114), that possession of land was no criterion of title, and that no person in his senses would take an offer of a purchase from a man merely because he stood upon the ground. The purchaser must look to his title, and if he did not it would be *crassa negligentia*. Lord Nottingham is reported to have said in Sergeant Maynard's case (3 Swanst. 655):—"He that purchases lands without any covenants or warranties against prior titles, if the land be afterwards evicted by an *eigne* title, can never exhibit a bill in equity to have his purchase money upon that account; possibly there may be equity to stop the payment of such purchase money as is behind, but never to recover what is paid, for the chancery mends no man's bargain." The doubt expressed about the unpaid purchase money has by various decisions long since been removed, and it is established that the purchaser who has received no covenants which cover the defect or incumbrance, cannot detain the purchase money. Fraud is an exception to this principle, but it is a matter of some difficulty to determine what degree of misrepresentation or concealment on the part of the seller will amount to such a fraud as the law will hold does avoid the contract. The leading case upon this point is *Edwards v. McLeay* (Cooper 308). That case was decided upon the fact that the fraud consisted in the concealment that a part of the premises conveyed—that is, where the stables stood, and also the driving way leading to the house—formed part of a common, and that in truth the seller had no title to that part. That was a fact independent of any information which the abstract disclosed, and which the purchaser could not ascertain from the abstract or search connected with it. It was laid down in the case of *Early v. Garrett*, before mentioned, that no distinction should be made between an active and a passive communication, for a fraudulent concealment is as bad as a wilful misrepresentation. Sir Edward Sugden, in his work on the law of property as administered in the House of Lords, page 644, says: "It is perfectly clear that upon a sale a vendor is bound to furnish the purchaser with all the documents relating to the title,

and to inform him of all facts necessary to be known which are within his knowledge relating to the title, and which do not appear on the face of the abstract. If any document or fact be withheld fraudulently, of course the purchaser is entitled to relief, and even where the omission is not owing to moral fraud, but the seller or his agent exercises his own judgment and excludes an important document from the title, and the objection arising upon it is not a subject of compensation, it appears to me equity is bound to relieve the purchaser from the contract."

The non-communication in the present case was not, however, of a fact independent of what the purchaser would be bound to make inquiry about. The difficulty must have presented itself at the threshold of the inquiry, and that difficulty was a legal one; and in taking the title the purchaser must be supposed to take it upon his own judgment, and upon his own responsibility. In *Edwards v. McLeay*, Sir William Grant says: "Whether it would be fraud to offer as good a title which the vendor knows to be defective in point of law, it is not necessary to determine." The point suggested calls for an examination of the facts of the present case, and whether the legal defect may be ascertained or known by the purchaser as well as the seller. It appears from the defendant's letters accepting the plaintiff's proposals to purchase, that he apprized the plaintiff that the patent for one portion was to Daniel Jackson, and for another portion the patent was to Thomas Jackson, and that Mr. Torrance's title was derived from William Fairfield and his wife. Now when we look to the facts of the case of *George v. Thomas*, which are incorporated with this case, we find that Fairfield and his wife Margaret Jackson claimed the lands in question under the will of Thomas Jackson (See 10 U.C.K. 604). At the trial of *George v. Thomas* the principal question seems to have been as to the legitimacy of Margaret Jackson. It is very true that point would not have been disclosed by the deeds and will to the plaintiff, nor could he, by anything appearing upon the face of these documents, have been led to make any inquiry upon that subject. If the case had depended upon that fact, and that fact had been known to the defendant when the

plaintiff purchased, and he had concealed it from him, I should have thought this case then came within the rule of the exception, and that a fraud or concealment of a material fact necessary to be known had been established, and that the plaintiff ought to recover. It was plain, however, that the defendant knew nothing of such fact, but the concealment complained of was the information which Mr. Torrance said he gave him. That information was vague, and merely that other parties claimed the lands. The case of *George v. Thomas* did not depend upon the fact of the legitimacy of Margaret Jackson. That fact was an additional circumstance in construing the will of Thomas Jackson upon which the title depended. Margaret Jackson took only an estate tail under the will, and having died without issue, it was of no consequence whether she were legitimate or not, the devise over would take effect. The court so determined upon this same will with respect to another property.—*Doe Anderson v. Fairfield* (3 U. C. R. 140).—I came to the same conclusion in another case, without seeing this last authority, upon similar words used in a will.—*Doe Forsyth v. Quackenbush* (10 U. C. R. 153).

It is plain, therefore, that the title to these lands depended upon the construction of a document which the plaintiff must have had submitted to his consideration, or which he waived the consideration of; and therefore, though the defendant may have heard that other parties claimed the lands, yet if the matter was as open to the plaintiff to exercise a judgment upon as it was for the defendant, then the defendant not mentioning what he had heard cannot be treated as a fraudulent concealment of a fact material to the plaintiff to know, and which the defendant was bound to state. It is not in human nature to believe that one would willingly inform a purchaser that he had heard rumours that his title was not good; though if there be a material fact important to be known, he would without doubt be bound to disclose his knowledge of it. The defendant mentioned in his letters what the title was; and if the plaintiff took it without making such inquiry as that information gave him, then the principle *vigilantibus non dormientibus jura subveniunt* applies. If he made the

inquiry, he must have seen upon what the title of Margaret Jackson depended; and if he were content to rely upon that without requiring covenants for title, he cannot, because it is established that the defendant had heard rumours of other parties claiming, which circumstance he did not disclose when selling, claim a return of the purchase money.

In addition to section 1 of the 6th chapter of Sir Edward Sugden's work already quoted, containing a most elaborate review of the cases upon this subject, I would cite the 13th chapter of an American work, Rawle on covenants for title, in which are collected and discussed the American cases upon the same subject.

The rule should be made absolute for a nonsuit.

DRAPER, J., concurred.

Rule absolute.

SPALDING V. JARVIS.

Trespass—Pleading—New assignment.

In trespass against a sheriff and his bailiff for seizing and taking goods and converting and disposing thereof, &c., the defendants justified under a *fi. fa.* from the County Court.

The plaintiff in his replication admitted the writ and warrant, but new assigned that the said trespass was committed for other purposes than those in the plea mentioned, and after the return of the writ.

The defendants pleaded to this, justifying again under the writ, and averring that from the time of seizing the goods the defendants continued in possession thereof until the said time when, &c., when they removed the goods for the purpose of levying part of the moneys directed to be levied. The plaintiff, admitting the writ and warrant replied *de injuriâ absque residuo causæ.*

Held—That on these pleadings, the only question in issue was whether the goods were taken under colour of the writ and warrant, and that the plaintiff could not shew that an excessive sum was claimed for sheriff's fees, and the goods taken to enforce payment of such sum; for if this would have made the defendants trespassers, it should have been specially replied.

TRESPASS.—The declaration contained three counts, but nothing arose upon the first and second. The third was for seizing and taking goods,—*i. e.* 40 yards of narrow cloth, 10 yards of broadcloth, and 20 yards of satin, worth £30, and converting and disposing thereof, &c.

To this count the defendants separately pleaded not guilty; and jointly, that on, &c., Vose, Wood, and Vechter, sued out of the County Court of Northumberland and Durham a *fi. fa.* directed to the defendant Jarvis, against the

goods and chattels of the plaintiff, to make £72 2s. 1d., which they had recovered in the said County Court, in *assumpsit*, returnable on the first day of March term, 1852 (8th March, 1852), indorsed, &c., and delivered to the defendant Jarvis on the 19th of February, 1852; by virtue whereof the defendant Jarvis, on &c., made his warrant in writing, sealed with his seal of office as sheriff, directed to the defendant Garside, he being sheriff's bailiff, and by such warrant commanded him, &c. (according to the writ :) by virtue of which writ and warrant the defendant Jarvis as sheriff, and the defendant Garside as his bailiff, did seize, &c., for the purpose of levying the moneys and the sheriff's fees, as directed by the endorsement, as they lawfully might, doing no unnecessary damage; *quæ sunt eadem* : verification.

The plaintiff replied, admitting the writ and warrant, that he issued his writ and declared in the cause, not for the trespass in the plea mentioned, but for that the defendant on the 9th of March, 1852, for other and different purposes than those in the plea mentioned, and after the return of the writ, committed the said trespass, *modo et formâ* in the third count mentioned, which newly assigned trespass is different from that mentioned in the plea : verification.

To this the defendants rejoined, that before the time in the new assignment mentioned, *i. e.* on &c., Vose, Wood, and Vechter sued out of the County Court of Northumberland and Durham a writ of *fi. fa.* directed to the defendant Jarvis, against the goods and chattels of the plaintiff, to make £72 2s. 1d., which they had recovered in the said County Court, in *assumpsit*, returnable on the first day of March term, 1852 (8th March, 1853), endorsed to levy, &c., and delivered the said writ to the defendant Jarvis on the 19th of February, 1852; by virtue whereof the defendant Jarvis made his warrant, sealed, &c., directed to the defendant Garside, to execute the said writ, by virtue of which writ and warrant the defendant did seize and take in execution the said goods and chattels, for the purpose of levying the said moneys and the sheriff's fees—averring, that from the time of so seizing and taking possession of the last mentioned goods, by virtue of the said writ and warrant, the defendants continued in possession of the

same, until the said time when, &c., when the defendants removed the goods and chattels in the third count and new assignment mentioned, for the purpose of levying part of the moneys directed to be levied, which is the same trespass, &c.: verification.

To which the plaintiff replied, admitting the writ and warrant, *de injuriâ absque residuo causæ*.

The case was tried at Toronto, in January, 1854, before *Draper, J.* It appeared that the warrant was directed to one Roddy and the defendant Garside, and that Roddy, shortly after receiving it, levied on the plaintiff's goods, and having receipted them quitted actual possession, keeping one key of the shop; that some time afterwards, but before the return day of the writ, the defendant Garside entered into possession of the goods in a shop kept by the plaintiff, and kept possession for a short time, and then allowed the plaintiff to enter and carry on his business. Some days after, but still before the return day of the writ, the defendant Garside resumed possession again, and held it until the 9th day of March, the writ being returnable on the 8th. Before the return day the plaintiff settled the debt, and everything but the sheriff's fees, with the attorney of the execution creditor, and produced to Garside on the return a memorandum in writing to that effect, and offered a certain sum of money, producing it and putting it on the counter in the shop, for the sheriff's fees, which money Garside refused to accept, claiming more, and on the next day he took this money and the goods claimed, stating that he held them to make up the full amount of the sheriff's fees, as he claimed £6 6s. more than the sum paid by the plaintiff. A letter was proved from the defendant Jarvis to the plaintiff, claiming this £6 6s., and informing him that the goods seized would be sold on Friday, the 28th of May, 1852, unless previously redeemed by him. Another letter, written to the plaintiff by the deputy sheriff, and dated the 8th of September, 1852, was also proved, expressing regret at the difficulty which had arisen, and hoping that the plaintiff would let the matter drop, and the cloth brought away should be returned; although the sheriff was out of pocket some

six pounds odd by the transaction, yet he would rather lose than have any further trouble about the matter.

On this evidence the jury were directed in favour of the defendants on the third count and the pleadings thereunder. The writ and warrant were stated to afford a justification for the seizing while the writ was in force, and taking away goods afterwards to satisfy fees claimed under it, as it seems indisputable the seizure was under colour of the writ; and that on these pleadings the question of excess in demanding too much for sheriff's fees did not arise, even if that would have made the defendants trespassers.

The jury found for the defendants.

In Hilary term *Bell* obtained a rule *nisi* for a new trial without costs, for misdirection, and the verdict being contrary to law and evidence, citing *Carnaby v. Welby*, 8 A. & E. 872; *Norman v. Wescombe*, 2 M. & W. 349; *Spotswood v. Barrow*, 5 Ex. 110.

S. M. Jarvis shewed cause, and cited *Price v. Peek*, 1 Bing, N. C. 380.

DRAPER, J., delivered the judgment of the court.

It seemed to me quite clear that the seizure of the goods during the currency of the writ, must on the evidence be attributed to it, and the remaining in possession and taking away the goods after the return day, to satisfy a claim for sheriff's fees, whether that claim was strictly legal or no, must be treated as done under colour of the writ. The replication *de injuriâ absque residuo causæ* appeared to put in issue only whether the taking the goods was done under colour of the writ and warrant or not; and on the evidence this appeared to me to admit of no doubt, for what the plaintiff complained of was not that the goods had been seized and taken with an object entirely distinct from executing the *fi. fa.*, but that a larger sum was claimed for sheriff's fees in executing the writ than the law allowed, and that the goods were taken to enforce payment of this larger sum, and so the defendants became trespassers *ab initio*. This did not appear to me to be open to the plaintiff on these pleadings, and I have not yet altered my opinion.

Rule discharged.

DOLREY V. THE ONTARIO, SIMCOE, AND HURON RAILROAD
UNION COMPANY.

Railway fences—Liability of O. S. & H. R. R. to make and maintain—Adjoining close—Cattle trespassing—12 Vic., ch. 196, sec. 18.

Where the plaintiff's cow, trespassing on A's close, strayed upon the defendant's railway adjoining, through a defect in the fence, which, in certain cases, as against A. the defendants were bound to make and maintain.

Held, on demurrer to the declaration, that the plaintiff could not recover—*first*, because both at common law and by their act of incorporation, the obligation to make and maintain fences would apply only as against the owners of the adjoining close; and, *secondly*, because it was not clearly averred either that the owner of the land adjoining had requested the defendants to enclose their road, or that they had thought proper to do so; on one of which facts the obligation is made by the statute to depend.

CASE.—The first count of the declaration stated that after the passing of the act incorporating the defendants (12 Vic. ch. 199), and after the passing of the "Railway Clauses Consolidation Act," 1851, and before and at the time of the committing the grievances hereinafter mentioned—to wit, on, &c.—the said defendants were owners of a certain railway, which said railway during all the time aforesaid ran, and still runs, upon and over certain land taken for the use of the same under the provisions of the statute in such case made and provided, and which said railway of the defendants, during all the time last aforesaid, was used for the propulsion of carriages, &c., by locomotive steam-engines; that the plaintiff before and at the time when, &c., to wit, on, &c.—was lawfully possessed of one cow, &c., which said cow before and at the time when, &c., was depasturing, and lawfully being in and upon certain land, situate, lying, and being, adjoining and abutting upon the said railway of the defendants, and to and upon the said lands so taken for the use thereof; that it became and was the duty of the defendants to make and erect a sufficient fence in and upon the said land so taken, for the use of the said railway of the defendants, or adjoining to the same railway, and also cattle-guards at all road crossings suitable and sufficient to prevent cattle and animals from getting on the said railway: yet the defendants, not regarding their duty, nor the statutes in that behalf, did not, nor would make or erect, or cause to be made or erected, in or upon the said land so taken for the use of the said railway, or adjoining to the same, a sufficient or any fence, or cattle-guard, suitable and sufficient to prevent cattle and animals from getting on the

said railway of the said defendants; but therein respectively wholly failed and made default; by means of which said several premises, and for want of such fence and cattle-guards as aforesaid, afterwards—to wit, on, &c.—the said cow of the said plaintiff, so depasturing, &c., strayed, erred, and escaped out of, off, and from the said adjoining lands, into and upon the said railway of the defendants, and was then, in and upon the said railway, by a certain locomotive steam-engine, and train of cars of the defendants, then being and travelling in and upon and along the said railway, struck against, run down and over, and killed.

Second count—That the defendants made and erected a certain fence and cattle-guards upon the said land so taken for the use of their railway as aforesaid, suitable and sufficient to prevent cattle and animals from getting on the said railway; and thereupon, and after the said fence and cattle-guards had been so erected, and whilst the said railway was being used for the propulsion of trains, &c., it became and was the duty of the defendants from time to time to maintain the said last mentioned fence and cattle-guards so erected in and upon the said lands so taken, &c., sufficient to prevent cattle and animals from getting on said railway: yet the said defendants, not regarding their duty nor the statutes in that behalf, did not nor would maintain the said last-mentioned fence and cattle-guards, sufficient, &c.; by reason whereof a certain locomotive steam-engine and train struck, ran over, and killed the plaintiff's cow.

The defendants pleaded to each count, that the said cow of the plaintiff was wrongfully and unlawfully depasturing and being upon certain lands adjoining to the said lands of the defendants, and to the said railway, which said lands were then not the lands of the plaintiff, but the lands, to wit, of one Richard Roe, who had not given any license or permission for the said cow to be thereon; that the said cow, being so unlawfully thereon, strayed therefrom on the said adjoining lands of the defendants, and then, at the said time when, &c., on to the track of the said railway, and being then and in manner aforesaid got, upon the said track, was accidentally and without any design on the part

of the defendants, or their servants or agents killed, in manner as in the said first count mentioned.

Special demurrer to each plea, and notice of exceptions to the declaration.

Vankoughnet, Q. C., for the demurrer. *Dempsey contra*.

The authorities cited are noticed in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

This declaration seems to have been framed, as regards both counts, closely upon the form given in the report of the case of *Ricketts v. East and West India Dock Railway Company* (16 Jur. 1072, 12 Eng. Rep. 521), in which case the judgment of the court is a very strong if not conclusive authority against this action. It is upon the statute 12 Vic. ch. 196, incorporating this company, and the principles of the common law, that the right of action in this case must depend; for the Railway Clauses Consolidation Act, 14 & 15 Vic. ch. 51, does not apply to this company, and there is nothing in the 12 Vic. ch. 196 which can be made the ground of placing this plaintiff upon a more favorable footing than the plaintiff was in *Ricketts'* case.

The defendants are entitled to judgment, in our opinion, upon the double ground,—that the declaration is insufficient, and also that the pleas set up a sufficient defence. The latter point is established by the decision in *Ricketts'* case; for the pleas distinctly allege that the plaintiff's cow was wrongfully in the close adjoining to the railway, without the permission of the owner of that close, and that she strayed from thence to and upon the railway. That, according to the authority of *Fawcett v. The York and North Midland Railway Company* (20 L. J. Q. B. 222), might have been no defence to the action, if the defendants in this case were absolutely bound, as the defendants were in that, under the provisions of their charter, to keep their road enclosed as against all the world, and not merely as regards the owner of the adjoining close. If we were at liberty to take this case up without reference to anything but the principles of the common law, the pleas would be a good defence, upon the authority of *Ricketts'* case, and the case of *Dovaston v. Payne* (2 H. Bl. 527), and other

authorities there cited. And the statute 12 Vic. ch. 196, sec. 18, places the plaintiff on no better ground, for that follows the common law principle, and only creates an obligation as between the company and the owners of each adjoining close.

We see no ground for distinguishing the 18th clause in that respect from the 68th clause of the English General Railway Act, 8 & 9 Vic. ch. 20, on which Ricketts' case was determined. On the contrary, our statute 12 Vic. ch. 196, where it does deviate from the provision in the 68th clause of the English Railway Act, does so in such a manner as to make the obligation much less stringent upon the company; for it makes the obligation depend upon the proprietor of the adjoining land desiring the company to fence in their railway, which is not here alleged; and upon this difference we think we should be bound to hold, if the pleas were bad, that the defendants would nevertheless be entitled to judgment on this demurrer, because the declaration is insufficient in not averring such a request as was necessary before the duty could attach. That objection would clearly apply as regards the first count, and equally perhaps as regards the second count, though that may admit of more doubt, as it is alleged in that count that the defendants had put up the fence, from which it may be inferred that they had "thought proper" to fence off the road, and that, according to the words of the 18th clause, would make the duty attach of keeping it separated by a sufficient enclosure. This is rather a singular provision, for it seems to make the company's obligation to enclose depend upon their choosing to do it; that, at least, is one of the conditions upon which the obligation is to attach. The other condition is the adjoining proprietor requesting it to be done. Neither is averred in the first count,—nor, indeed, in the second, further than that it is set forth that the company did make a sufficient fence, which may be relied upon as tantamount to setting forth that "they had thought proper to make it," and so to throw upon them the obligation to maintain it for ever thereafter.

From comparing the 18th clause with the clauses relating to the same subject in the Railway Clauses Consolidation Act,

I suppose the intention was not to make it imperative upon the company to fence off their land immediately on taking possession, and before their road should be in use, unless the proprietor should require it; but the language used is such in this act as not to make it necessary at any time to fence in their road till they have been required by the proprietor of the adjoining land to do so. The intention, however, may have been (as great part of the road might go through uncleared lands) to leave the company at liberty to dispense with any inclosure, if they thought it prudent as regarded safety in using the road, except where the proprietor of any adjoining land insisted upon their fencing off their railway from his land.

Holding the pleas to be a sufficient defence, our judgment is for the defendants.

Judgment for defendants on demurrer.

HEWITT v. THE ONTARIO, SIMCOE, AND HURON RAILROAD UNION COMPANY.

Action for fire caused by sparks from locomotive—Evidence of negligence—Necessity for keeping the line clear of brushwood, &c.

CASE, against a railway company for negligence and improper management of a locomotive, so that sparks escaped and set fire to the plaintiff's timber near the line of road. It appeared that the fire was caused by the engine, but that all usual and proper precautions had been used in the construction and management of it.

Held, that on this evidence the defendants should in reason have succeeded; and a verdict having been found for the plaintiff, a new trial was granted on payment of costs.

Semble, however, that in such cases it would add materially to the defendants' case to show that they had thoroughly cleared away all logs and brushwood, &c., from the whole space occupied by their line of railway in its ordinary width.

CASE.—The declaration alleged that the plaintiff was lawfully possessed of certain timber, ties, staves, and wood near to the defendants' railroad, in the County of York; and that the defendants were possessed of a certain steam-carriage and engine, containing fire and igneous matter, then driven along the said railroad near the plaintiff's timber, &c., which steam-carriage was under the care and management of the servants and agents of the defendants: yet the defendants, by such servants and agents, on, &c., and on divers other days, &c., whilst using and propelling the steam carriage, &c., so carelessly, negligently, and

improperly managed, conducted, and directed the same, that by their carelessness, negligence, and improper conduct, divers sparks of fire, and divers portions of the said fire and igneous matter, passed and flew from and out of the said steam-carriage and engine amongst the said timber, &c., and by means thereof the said timber became ignited and was destroyed; by means whereof the plaintiff lost the use of the same, and was put to expense, &c. Second count—Similar to the first, stating the plaintiff's timber to have been in the County of Simcoe. Third count—Like the first as far as the statement of the defendants' possession of a steam-carriage, under the care, &c., of their servants and agents:—yet the defendants improperly and wrongfully omitted to supply the said steam-carriage and engine with a guard or bonnet to confine the fire and igneous matter and the sparks therefrom from escaping; and in consequence, and from the insufficiency of the guard or bonnet attached to the flue of the engine, sparks of fire, and portions of the fire and igneous matter, passed and flew from the steam-carriage and engine upon the plaintiff's timber; &c., whereby the said timber was ignited and was consumed; by means whereof, &c. Fourth count—Similar to the third, but alleging the plaintiff's timber to have been in the County of Simcoe. Damages £1,000.

Pleas—Not guilty; and that the plaintiff was not at the several times, &c., possessed of the timber in the declaration mentioned.

The case was tried at Toronto, in November, 1853, before Draper, J. The plaintiff gave evidence, that on the 24th of June, 1853, about ten or fifteen minutes after the defendants' engine had passed along through some woods in which the plaintiff's timber was, a fire was observed in the old brushwood and logs, &c., which had been cut off the track along which the railway passed on clearing it, and that this fire spread to a considerable extent through the woods, and damaged or destroyed some of the plaintiff's timber, ties, &c., prepared for erecting a large bridge; and that on the 4th of July following, and very soon after the defendants' engine had passed up, a similar fire broke out near where the former had been, and destroyed an additional quantity of the plaintiff's timber, &c. One of the plaintiff's witnesses

swore that on the evening of the 24th of June, as the engine and train were returning to town, he heard the fireman observe to the engineer, just as they came to where the fire had been, and pointing at the fire, "That's some of our good doings as we were going up." Several of the plaintiff's witnesses deposed to the fact that on both occasions the fire broke out soon after the engine passed by. Some swore to observing the sparks fly out thickly from the funnel. It was proved that the coals from the fire-place also fell out along the track at times, and evidence was given of other fires attributed to the steam-engine going along the track. The plaintiff called one of the defendants' engineers, in order to prove that a particular engine, called the "Toronto," was used on the 24th of June and 4th of July on the road, and he gave evidence leading to that opinion; though on cross-examination, he stated he did not know what engine was run on either of these days; but it was proved that the wire of which the bonnet of the "Toronto" was made was coarser, and the meshes were much larger than in the bonnets of other engines of the defendants, and that consequently much larger sparks would escape from the "Toronto" than from the other engines.

The defendants called Mr. Brunel, their superintendent and a civil engineer, who explained the construction of the pipe or flue and bonnet. He proved distinctly that on the 24th of June and the 4th of July, an engine called the "Josephine" was run with the passenger train, and that the "Toronto" was at that time undergoing some alterations. He stated that the hood or bonnet of the "Josephine" had never been altered as to the wire used, and that it was one of the very finest, so that nothing but the smallest sparks could escape, and that this engine had every appliance in approved use for safety; that openings to admit air to the fire, and to let the smoke escape, are indispensably necessary for the using of steam-engines.

The jury were directed to enquire—1st. Whether the fires were caused by the defendant's engine. If not, then the verdict should be for the defendants; if yes, then, 2ndly, was there any negligence? That the simple fact that the fire was caused by the defendants' engines, would not con-

clusively establish negligence, but that the evidence must satisfy the jury there was a breach of a duty, a negligence in fact, which is what the declaration charged ;—that if the construction of the engine was such as to render accident all but impossible, unless there were neglect in the use of it, then if the injury complained of did arise from the engine, that afforded evidence from which a presumption of negligence would arise ;—that the using an engine constructed in a manner, omitting known and proper precautions against accidents, was evidence of negligence ;—that negligence might exist either in the mode of using a good engine, or in using one improperly and defectively constructed.

The jury found for the plaintiff—damages £170.

In Michaelmas Term, *Vankoughnet*, Q. C., obtained a rule nisi for a new trial, on the ground that the verdict was against law and evidence.

In this term, *Eccles* shewed cause, citing *Aldridge v. the Great Western R. W. Co.*, 3 M. & G. 515. *Vankoughnet*, Q. C., in support of his rule, urged that the defendants were carrying on a business sanctioned by act of parliament ;—that, being lawful in itself, and having used all known precautions against accident, as the evidence shewed, they were not liable, even though the fire proceeded from their engines. He cited *Piggot v. East. Co. R. W. Co.*, 3 C. B. 229.

ROBINSON, C. J., delivered the judgment of the court.

We have had some difficulty in making up our minds upon the course proper to be taken in disposing of this application. The charge given to the jury is not complained of, and there is no doubt but it stated the law correctly, and placed properly before the jury the different considerations by which they should be governed in determining the question of liability. If a new trial be ordered, it must go to the jury on a similar charge.

We have therefore to consider whether it can be said that the jury did wrong in finding as they did, upon the evidence that was before them. If they were in any degree influenced by what was proved in an early part of the trial respecting the alleged insufficiency of the wire guards upon the funnels

of the locomotive engine called the "Toronto," as being too coarse, and allowing large sparks to be thrown off by the flues, then the defendants have been hardly and not justly dealt by in being held liable on that pretence, for it really does seem to have been clearly proved on the part of the defendants that that engine was not in use on the occasion complained of, but another engine, having wire guards or hoods so fine that they could not with any reason be complained of. In actions of this nature it is always necessary to be borne in mind, that it is more than railway companies can be expected to undertake, that the business which they are conducting should be always so managed as to prevent accidents, though undoubtedly they are bound to do what they can to prevent mischief to others; and any want of due precaution, or care, or skill, in their management, which can fairly subject the company or their servants to the charge of negligence or unskilfulness, will expose them to the necessity of making compensation to those who may suffer loss from their business being conducted improperly.

In the cases cited in the argument of *Piggot v. The Eastern Counties Railway Company*, 3 C. B. 229, and *Aldridge v. The Great Western Railway Company*, 3 M. & G. 515, the principles of law, and the suggestions of reason, which should prevail in disposing of actions of this kind, are very clearly stated. They are cases very analogous to the present, and one can hardly read them, we think, without coming to the conclusion that in the view of those who were concerned in determining those cases, such evidence as was given upon the trial of this case, ought in reason to have been held to acquit the defendants.

But we have had one difficulty to contend with in this case, though on a ground that perhaps is not fairly presented on the record—we mean, that it does seem to us that the defendants should be regarded as using their railway at great risk to themselves of incurring liability to such claims as the present, so long as they omit to clear away thoroughly the whole space which they occupy for their line of railway, in those parts where it is confined to its ordinary width. It is not fair, we think, towards the public, that they

should leave logs, and brush, and rubbish, lying within their track, or upon the edge of it, because in dry weather in summer sparks that would escape through a guard of the usual fineness, falling upon combustible matter so near to the track, may easily do mischief, not only to one or more individuals, but may inflict a great calamity upon a large extent of territory—a small spark that would be extinguished before it could light if it had fifty or sixty feet to pass through, may easily kindle a fire if it finds dry brush and leaves within a few feet of the engine. Still the omitting to clear thoroughly a sufficient space on each side of the track is not what has been complained of here, and therefore may be said not to be properly in question.

We are, on the whole, led by a consideration of the facts of this case, though not without hesitation, to make absolute the rule for a new trial upon payment of costs.

Rule absolute.

MCLAUGHLIN V. BROUSE.

Debt—Promise to pay not sufficiently expressed.

The plaintiff gave to the defendant a bill of sale of certain timber, in which was contained a proviso for making the same void in case the defendant should pay to the plaintiff £300 and interest on a day named; and it was added, "but if default be made in payment of said £300 in part of the whole, contrary to the manner and form aforesaid, then it" (the bill of sale) "shall remain and be in full force and virtue."

Held, on demurrer, that debt would not lie, the deed not sufficiently importing a promise to pay.

The plaintiff declared in debt, on an indenture or mortgage deed, by which it was alleged the defendant had covenanted to day to the plaintiff the sum of £300 and interest.

The defendant cravedoyer, and the deed was set out as follows:—

"BILL OF SALE.

"Know all men by these presents, that I, William McLaughlin, of," &c., "for and in consideration of the sum of three hundred pounds of lawfull money of this Province, to me in hand paid by George Brouse, of," &c." "merchant (the receipt whereof I do hereby acknowledge), have bargained, sold, and delivered, and by these presents, according to due form of law, do bargain, sell, and deliver unto the said George Brouse all the timber,—that is to say, white pine, elm, and oak, and all the other sorts of timber

that I the said William McLaughlin have now in my possession in the raft marked "W. M. L."—which timber is got out by the said William McLaughlin, and is now lying on the Castore River, Township of Russell, and province aforesaid. And the parties further agree, that the said William McLaughlin is to take the timber to Quebec market, for and under the control of the said George Brouse : to have and to hold the said bargained property unto the said George Brouse, his executors, administrators, and assigns for ever. And I the said William McLaughlin, for myself, my executors and administrators deliver the said bargained property unto the said George Brouse, his executors, administrators, and assigns, against all persons, shall and will warrant and defend for ever by these presents (if the bargained property be redeemable by a limited time a proviso of this nature is added): *Provided notwithstanding, that if the said William McLaughlin, my executors, administrators, and assigns, or any of us, do and shall well and truly, pay or cause to be paid, unto the said George Brouse, his executors, administrators or assigns, the sum of three hundred pounds, principal and interest, lawful money of this province, on the first day of June next ensuing the date hereof, for redemption of the bargained property, then this present bill of sale shall be void and of no effect; but if default be made in payment of the said three hundred pounds in part of the whole, contrary to the manner and form aforesaid, that then it shall remain and be in full force and virtue.*

"In witness whereof I have hereunto set my hand and seal the tenth day of April, in the year of our Lord one thousand eight hundred and forty-three."

"(Signed) WM. McLAUGHLIN, [L.S.]

"Witness { SAML. HULBERT,
G. W. BROUSE."

The defendant demurred, because "the demand in the declaration is found upon an alleged covenant to pay money contained in the said supposed indenture or mortgage whereas there is no such covenant whatever contained therein."

Hagarty, Q. C., for the demurrer, cited *McFattridge v. Talbert et al.*, 2 U. C. R. 156; *Courtney v. Taylor*, 6 M. & G. 851; *Rashleigh v. South-Eastern R. W. Co.*, 10 C. B. 612; *Yates v. Aston*, 4 Q. B. 182.

A. Crooks, contra, cited *Com. Dig. "Debt" A, 4*; *Connoch v. Jones*, 18 L. J. (Ex.) 204; *Wood v. Copper-Miners' Co.*, 7 C. B. 906.

ROBINSON, C. J., delivered the judgment of the court.

In our opinion debt does not lie upon the instrument set out on oyer; there is no covenant, as is usual, where there is a sum due and a mortgage made to secure it; still debt might notwithstanding lie, if we could see on the face of the instrument that there was an acknowledgment of money lent, or of a debt on any account, because then the obligation to pay it would arise, and no words of covenant or promise would be necessary.

But we can see nothing more than this—that the defendant, having a quantity of timber marked in a certain manner, and lying at a certain place, bargains and sells it to the plaintiff for a certain sum. That might well be an absolute sale, and not a security for any preëxisting debt; because the timber, being made, and marked, and got together, could of course be estimated, and there is nothing that would entitle us to say that £300 was not agreed by both to be its value, as upon a sale, which is what the deed imports. Then it was to be taken to Quebec by the defendant for the plaintiff, which is consistent with the fact of its being the plaintiff's property, and not merely mortgaged to him. Then a proviso is entered after (a parenthesis in the printed form as I suppose, which being a mere direction to the conveyancer, has been absurdly allowed to stand as part of the instrument)—“that if the defendant shall pay to the plaintiff *the sum of £300, principal and interest, on the first of June next, for the redemption of the bargained property then the bill of sale shall be void.*” Then follow some which are more significant of a debt than anything else in the instrument—viz., “But if *default* be made in *payment* of the said £300, *in part of the whole*, according to the manner and form aforesaid, then the bill of sale is to remain in force.

I should think it probable from this that the defendant owed the plaintiff for advances perhaps a larger sum than £300; but whether this timber was valued at £300, and sold for that, with a privilege to redeem or buy back, if the defendant should choose to do so, by paying £300, otherwise that the sale should continue an absolute sale; or whether the parties may not have intended that there was to be a sum paid on the 1st of June, and that this timber, without reference

its value, was to be held in security for such payment, I cannot clearly satisfy myself—I mean as regards moral conviction. As a mere question of law, we think the writing does not sufficiently import a stipulation to pay £300, on the 1st of June, to support the statement in the declaration, that the defendant did by the deed bind himself to pay the money on that day. I refer to *Suffield v. Baskerville* (2 Mod. 36), *Briscoe v. King* (Cro. Jac. 281), *Platt on Covenants*, 36. We had a similar question before us in *Hall v. Morley* (8 U. C. R. 584).

Judgment for defendant on demurrer

FERRIS V. FOX.

Division Courts—Suits by infants in—13 & 14 Vic. ch. 53, secs. 23, 27.

The 27th clause of 13 & 14 Vic. ch. 53, does not restrict infants from suing in the division courts for anything but wages, but was intended only to enable them to recover for their own labour, contrary to the principles of the common law.

This was an action brought in the division court of the county of Middlesex upon a claim for board and lodging of a third person, and for goods sold and delivered.

The plaintiff, it seemed, was a young woman, about seventeen years of age. The defendant was her step-father, and she sued him for board furnished to his wife, the plaintiff's mother, and for some articles of dress supplied to her during the defendant's absence from home.

At the trial, it was objected that the plaintiff, being a minor, could not sustain an action upon a claim of this kind, for that there was but one case in which an infant could recover as plaintiff in the Division Court, and that was under a special provision made in the statute 13 & 14 Vic. ch. 53, sec. 27:—"that it shall be lawful for any one under the age of 21 years to prosecute any suit in any Division Court, under this act, for any sum of money not exceeding £25, which may be due to him or her *for wages*, in the same manner if he or she were of full age."

The learned judge however gave judgment for the plaintiff to recover £10, no part of that sum being a demand for wages. This judgment was given in November last.

Wilson, Q. C., moved for a prohibition, on the ground that

it was not competent to the Division Court to entertain a suit brought by an infant on any demand except for wages.

Cur. adv. vult.

ROBINSON, C. J., delivered the judgment of the court.

These courts have by the 23rd clause of the act jurisdiction "to hold plea of all claims and demands whatsoever, for or against any person or persons, bodies corporate, or otherwise, of debt, account, or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed shall not exceed the sum of twenty-five pounds."

We do not in this case grant the application. The 27th clause of the Division Court act does not appear to us to be by any means intended as a restriction upon the right of infants to sue in the Division Courts, but rather the contrary—the object being to enable an infant to sue for his labor, contrary to the principle of the common law, which would give his earnings to his father. The clause leaves the right of infants to sue upon other causes of action as it stood before, and no doubt an infant may well recover any demand that he may have for goods sold, money lent, &c.; his infancy being a protection to himself, not to his debtor. We have no authority to go into the merits in this case, and are bound to suppose that the judge, who had a general jurisdiction over demands of this nature, found a good cause of action proved against the defendant.

We find nothing in the statute respecting the mode in which infants may sue, no means given of appointing a next friend, nor any necessity imposed of doing so, or of giving security for costs. The defendant here, being found to be indebted, is not prejudiced by the plaintiff being an infant; he can have no claim for costs.

In a Superior Court, if an infant were to sue by attorney, it would not now be a ground of error, but the defendant must plead in abatement; and we apprehend his suing in person would not be a ground of error, but even if it would, that would not shew that the Division Court has not jurisdiction in any case of a demand by an infant.

Rule refused.

TOWERS V. TALBOT ET AL.

Wharfingers—Liability of, for goods lost.

The plaintiff landed with his goods in the night at the defendant's wharf. The landing waiter of the custom house being there, sent a person employed by the defendants as a watchman against fire to get the key of their warehouse on the wharf, and all the plaintiff's goods were put into it except a packing case, for which there was no room. Next day the plaintiff got all his goods except the case, and paid the defendants' charges upon them. The case was lost. The plaintiff was asked by one of the defendants to go and look at a box in the town which he thought to be his; not to speak of the loss: and to furnish a list of the things contained in the case.

Held, that there was sufficient evidence to go to the jury to charge the defendants; and a very moderate verdict having been given, much less than the amount of the loss, the court refused to disturb it.

CASE—The declaration charged that the defendants were possessed of a wharf at the city of Toronto, and that the plaintiff at the request of the defendants, had caused to be delivered to them certain goods and chattels contained in a packing case (goods enumerated,) of the value of £200, to be by the defendants safely and securely kept for the plaintiff for certain reasonable storage, wharfage, and reward, to be paid by the plaintiff to the defendants: whereupon it was the defendants' duty safely and securely to keep the same for the plaintiff, and to re-deliver the same to the plaintiff on request. Breach—non-delivery on request; and that by the defendants' carelessness and breach of duty the goods were lost.—There was a second count in trover.

Pleas—1st. Not guilty. 2nd. That the plaintiff did not deliver to the defendants the goods and chattels in the first count mentioned, *modo et formâ*.

The case was tried at the Toronto assizes, in January 1854, before *Draper, J.* The plaintiff proved that he arrived from Rochester with his family and effects at the defendants' wharf, about two o'clock in the morning of the 9th of October, 1853. He had several packages, among them the packing case in question, all of which were landed from the steamboat on the wharf. One James Barnard, who had been before then in the defendants' employ, but who a short time before had left them, and had been appointed landing waiter at the custom house, was on the wharf. Some of the plaintiff's family spoke to him (the plaintiff being ill) about the goods, and he sent the watchman (employed by the defendants to

keep watch against fire) to get the key of the storehouse on the defendants' wharf; and all the plaintiff's goods, except this packing case, for which it seemed there was no space, were put into it. Bernard stated that he told them the things would be all safe; that he should be there until six in the morning, before which hour the packages could not be examined and passed. In the afternoon of the same day the plaintiff got all his things except this case, which could not be found, paying the defendants' charges on the packages he received. Two or three days after one of the defendants asked the plaintiff to go and see a case in some part of the town, which it was suspected might be the plaintiff's. He did so, but it was not his. The same defendant told the plaintiff and his family to keep quiet—not to speak of the loss. One of the defendants asked the plaintiff's wife to furnish a list of the articles. The next day she called again, and the other defendant said he was not ready. The plaintiff's wife called again and got the list. The defendant said to her, he did not want to pay until he knew what he was paying for, and he gave her back the list. The contents of the case were proved by a daughter of the plaintiff, apparently about fifteen years old. From her statement the value must have been not less than £50. She swore that the plaintiff had not got the case or any of its contents.

For the defendants it was objected that there was no evidence whatever to go to the jury; but the learned judge decided otherwise, and left it to the jury to say if they were satisfied by the evidence that the goods were delivered by the plaintiffs to the defendants as stated in the declaration; telling them that the mere landing and leaving the case on the wharf was not sufficient to make the defendants liable; but there was the conduct of one of the defendants in sending for the plaintiff to look at a case which was thought might be the missing one, and the expressions used by the other defendant about paying, which should be considered as tending to an admission that they considered the case had been in their possession, or under their charge, so as to render them liable.

The jury found for the plaintiff £12 10s.

Hagarty, Q. C., moved for a new trial for misdirection, and

on the law and evidence, renewing his objection that there was no case whatever to go to the jury.

Dempsey shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

It does not appear to us that after all the testimony which was given in this case the learned judge could properly have told the jury that there was absolutely no evidence upon which the defendants could be held liable as having the box in question delivered into their charge. Fees, we take it for granted, accrue to the defendants, as owners of the wharf, for wharfage, if goods are placed upon the wharf, although they may never be placed in their warehouse; especially where, as in this case, the only reason for their not being taken into the warehouse was that which was assigned by the person who had the key—namely, want of room.

Still it is true that, although a wharfinger's liability will attach in respect to goods landed upon his wharf, though not taken or required to be taken into store, yet the goods must be in such a manner placed in his charge as that he may in person, or through his servants or agents, be privy to their delivery, and have the opportunity of taking care of them. In the language of Lord Ellenborough in *Buckman v. Levi* (3 Camp. 415), "the goods must be booked, or must be delivered to the wharfinger himself, or some person who can be proved to be his agent for the purpose of receiving them."

In that case a parcel of chairs packed up and addressed to a person to whom they were to be forwarded were taken by a servant to a wharf, and merely left there piled up among other goods. No receipt was taken for them, nor any entry made in a book. The servant swore that he saw a man upon the wharf whom he believed to be the servant of the wharfinger, but he did not know his name, and could not recognize his person; and he had no conversation with the wharfinger, or any other person on the premises. "The person," as Lord Ellenborough remarked, "upon the wharf when the chairs were left might be a thief watching for an opportunity to purloin them." There was really nothing in that case that could with any degree of fairness be relied upon for throwing

a liability upon the wharfinger. But surely in the case before us there was much more presented to the jury. Though it was at an unseasonable hour of the night, and one at which the defendants were not bound and could not be expected to be in attendance to receive goods, yet they might, if they pleased, make such arrangements as would in general afford to passengers and others landing at night the means of securing their goods upon their wharf or in their warehouse. And if, in fact, there was any such privity established in regard to this box which was afterwards unfortunately lost, they would of course be liable for it. They had, it seems, a man employed as a watchman by night to see that the warehouses and premises took no injury by fire or otherwise. This man, in order to discharge his duty effectually, must be up and about the wharf through the night; and though his employment did not by any means make him the agent or servant of the defendants for any other purpose than to guard against fire and robbery, yet it would be a very probable and natural arrangement that they should avail themselves of his services to take into the store any goods that might be landed from a passing steamboat at an unseasonable hour. They would not, as we may suppose, desire to lose their customary fees in such cases, and would perhaps like still less to be called up themselves at a late hour to go out and see the packages put in store. One is not surprised, therefore, when we see it proved, as it was upon the trial, that at the suggestion of the landing waiter of the custom house the defendants' watchman was sent for the key of their warehouse and brought it, and took in the smaller packages for which there was convenient room. It was to be considered by the jury, on a view of all the circumstances, whether the defendants' watchman was not fully in possession of the fact that the box was so left on the wharf for no other reason than that he could not stow it away conveniently in the warehouse.

Then when we see that the defendants took payment from the plaintiff of the customary fees for the goods which their hired watchman had admitted into the warehouse, and which had been landed upon their wharf at the same time with the missing box; and when we couple these facts with what

has been proved to have been said and done the next day by the defendants when they were informed of the loss of the box, and when a claim was made upon them in consequence, we must admit, we think, that the learned judge would hardly have been justified in telling the jury at the trial that they had no evidence to connect the defendants with the charge of this box, and had nothing to do but to acquit them.

It would be ungenerous and rigid in any such case to insist unfairly upon the efforts made by the defendants to recover the box as constituting plain proof of their consciousness of liability. The box contained, it seems, family clothing of considerable value: its loss must have been distressing to persons landing as strangers, and apparently in humble circumstances. The case was one to awaken sympathy, and the defendants might very naturally have interested themselves, and done whatever they could to trace the property, without feeling that they were legally liable, or intending to admit so much. But there was in this case some evidence which it was necessary to leave to the jury, as tending to prove an acknowledgment, or rather perhaps a sense of liability, which might arise, not from the defendants mistaking their position in point of law, but from their knowing better than others could know the real nature of the trust which they were in the habit of committing to the person who on this occasion received and stored some of the goods. As evidence serving to throw light upon that material point in the case, it was no doubt admissible evidence, and required to be weighed.

On the whole, we could not properly, we think, grant a new trial without costs, even if we were strongly inclined to think that the evidence could not be safely relied upon for establishing a liability, for there was not a mis-direction.

The jury gave an extremely moderate verdict, not by any means compensating the plaintiff fully for his loss; and we should only be increasing the misfortune, we believe, to both parties, by granting a new trial on the only terms on which we ought to do it.

Rule discharged.

TILT V. SILVERTHORNE.

Agreement—Construction of—"Therefrom."

In consideration that the plaintiff would deliver to the defendant 2,000 bushels of wheat, the defendant promised to deliver to him "within a reasonable time *therefrom*," 500 barrels of flour.

Held that the word *therefrom* must be construed to mean *thereafter*, and not that the flour was to be made from the identical wheat delivered.

This being the proper construction of the agreement, it was clearly no defence to plead that the defendant's mill containing the wheat was burnt down without any negligence on his part; though he would have been excused in that case if the other construction of the agreement could have been adopted.

ASSUMPSIT.—In the first count of the declaration the plaintiff alleged, that in consideration that the plaintiff would deliver to the defendant 2,000 bushels of wheat, of great value, &c. (not alleging that they were to be delivered to the defendant to be by him ground into flour for the plaintiff), the defendant promised to *deliver to him*, within a reasonable time "*therefrom*," 500 barrels of flour. He averred that he delivered the wheat to the defendant, who accepted and received it (not stating that it was received for any special purpose); but that, although a reasonable time had elapsed, the defendant had not delivered to him the 500 barrels of flour, or any part thereof.

The defendant's plea was, that while the wheat was in his possession, for the *purposes in the said count mentioned*, and before a reasonable time for converting it into flour had elapsed, the wheat of the plaintiff was by an accidental fire, without any negligence or fault of the defendant, burnt and destroyed; "so that the defendant could not deliver to the plaintiff *the said flour from the said wheat, according to his promise.*"

The plaintiff demurred, insisting that the burning of the defendant's mill was no reason why the defendant should not have complied with his undertaking as set forth in the declaration.

There was also a fifth plea to a second count, and demurrer thereto, the nature of which sufficiently appears in the judgment.

Hagarty, Q. C., for the defendant, contended that the first count of the declaration imported that he undertook to deliver to the plaintiff 500 barrels of flour, to be made *from*—that is, *out of*—the wheat which the plaintiff delivered to him; and

that, as the plaintiff's wheat was burnt up before the defendant could grind it, and as he, as a miller or warehouseman, was not liable for the accidental fire, he was released by the accident from his undertaking and all consequences of it.

Eccles, for the plaintiff, insisted that the agreement as expressed did not import that the defendant was to make the flour from the plaintiff's wheat; but that, after receiving the plaintiff's wheat, he was within a reasonable time therefrom (or *thereafter*) to deliver him 500 barrels of flour, in consideration for, and as equivalent to the quantity of wheat delivered.

ROBINSON, C. J., delivered the judgment of the court.

The demurrer to the third plea turns wholly upon the construction to be placed upon the word "therefrom" in the first count. The plaintiff, it is plain, wishes us to read the alleged agreement in one sense, and the defendant in another.

If the plaintiff's construction be the true one, then the plea is bad, in which he says that he could not deliver to the plaintiff the flour *from the said wheat, according to his promise*, because no promise to do so had been made. If the parties did really mean what the defendant insists was meant, then to give the agreement a contrary construction would greatly aggravate the misfortune which the defendant has suffered from the fire, by throwing upon him a liability which it was not intended he should assume. But not being at liberty to look out of the record, we can only say that in referring the word "therefrom" to the next preceding words, "reasonable time," rather than to the 2,000 bushels of wheat, we feel that we should be adopting the most natural construction of the language, and that we cannot venture to act upon a conjecture that the parties may have meant otherwise, and thus adopt a construction not so natural, but more forced (though, as the defendant's counsel contended, not one by any means irreconcilable with the words), being aware, as we are, from what has often been proved before us in relation to contracts in this description of business, that it is the usage of the trade, and the common understanding of the parties, that wheat delivered in large quantities at a mill, as this was, is not expected or intended to be kept apart and ground for the person delivering it, so that he is to have the flour made out of that identical

wheat, but becomes on its delivery the property of the miller to whom it is delivered, and who is bound to deliver its stipulated equivalent in flour such as will pass the understood inspection, or at least of that description which parties have a right to expect where nothing is said upon the subject of quality. Taking the contract to be one of that kind, the burning of the mill could not, as we think the defendant's counsel conceded, relieve him from the necessity of complying with his promise.

The fifth plea is an answer to the second count, in which the plaintiff himself has stated the agreement to have been such in its terms as the defendant insists it was—this count being, as we may suppose, inserted under the idea that even if the agreement should be considered, upon the evidence that should be given of it at the trial, to be an agreement to grind the plaintiff's wheat and deliver to him the flour made from it, he could still upon such a state of things insist on the value of his flour, notwithstanding the fire. But it is clear that upon such a transaction as this count states, the wheat would have continued all the time the property of the plaintiff, and if burnt while it was in the defendant's charge, in his capacity of miller, for the purpose of being ground, and without any negligence being chargeable against the defendant, he would stand excused. The plaintiff, indeed, as we understood, gave up this demurrer.

Judgment for plaintiff on demurrer to third plea,
and for defendant on demurrer to fifth plea.

IN RE REGINA V. ROBERTSON.

Apprentice—14 and 15 Vic. ch. 11, secs. 6, 7—Conviction illegal.

The defendant, a justice of the peace, convicted one R., an apprentice, of having absented himself from his master's service without leave, and adjudged that he should give sufficient security to make satisfaction to his master, according to the statute 14 & 15 Vic. ch. 11, and in default of such satisfaction be imprisoned in the common gaol for two months, unless the said satisfaction should be sooner given.

The conviction was quashed—*first*, because the articles of apprenticeship were not within the act, for it appeared that the apprentice was a minor, and the articles not executed by any one on his behalf; and *secondly*, because it could not be sustained under the sixth clause of the act for two month's imprisonment; or under the seventh clause, because the satisfaction to be given was not ascertained.

In this case *Phillpotts* obtained a rule nisi to quash a conviction.

The facts were these :

The defendant Dunham was a justice of the peace of the county of Leeds. He returned that on the 15th of July, 1853, one Walter Hunter made oath before him that he did, on the 15th November, 1852, in conjunction with one William Stockdale, a carriage maker, make an indenture with James Robertson, whereby Robertson bound himself to serve them as an apprentice to the carriage-making business for two years and six months; and that Robertson, after commencing his work as such apprentice, to wit, in the month of December or January then last past, did absent himself without leave, whereupon he the justice issued his warrant to bring Robertson before them to answer to the complaint; that Robertson was brought before him on the said 15th of February, and having heard the charge said he was not guilty—that thereupon a credible witness, Walter Hunter aforesaid, produced the indenture as mentioned, and deposed that Robertson served under it till the end of December or beginning of January, 1853, when he left their service and went to work in a shop in Perth; that he refused to return, as he said he was getting more wages, but afterwards did agree to go back and serve out his time, asking first to have two days' leave of absence, which was consented to, but he went away, and never came to serve his time out.—Hunter swore that he took from Stockdale on the 13th of July, 1853, an assignment of all his interest in the indenture, and continued to carry on the business.

The defendant Robertson told the justice, in answer to this charge, that he was willing to go and serve his time out, but could not give security that he would do so; and the complainant Hunter refused to accept his word, and insisted on having security; and the justice, thereupon, reciting that it appeared to him that Robertson was guilty of the offence charged upon him, convicted him thereof, and adjudged that he should "*give sufficient security to make satisfaction to the said Walter Hunter according to the statute 14 & 15 Vic. ch. 11, sec. 7, and in default of such satisfaction to be imprisoned in the common gaol for Leeds and Grenville for two months, unless the said satisfaction is sooner given.*"

And on the same 15th of July, 1853, the justice made his warrant to the high constable and keeper of the gaol, reciting that Robertson had been that day convicted before him, for that he did, on the 15th of November, 1852, at Perth, agree by indenture to serve as an apprentice to the carriage-making business with one Walter Hunter and William Stockdale for two years and six months; that he had commenced his service, and did serve till on or about the 1st of January, 1853, when he absented himself without leave, contrary to the form of the statute. Also that "being required to give security to the said Hunter and Stockdale, he had not given the same," but had therein made default, "whereupon" (he added) "I do adjudge the said James Robertson for his said offence to be imprisoned in the common gaol for, &c., for the space of two months, unless he gives the required security. These are therefore," &c.:—and he concluded by authorizing the gaoler "to receive him into custody, and to imprison him for two months, unless he gives the required security."

The indentures were produced, annexed to an affidavit of the defendant upon which he obtained the certiorari; they were in the ordinary form, with covenants for faithful service, executed by Robertson, and Hunter and Stockdale. In this affidavit Robertson swore that the indenture was executed on the 7th of February, 1853, and not on the day of their date—that he would not be of age till October, 1855—that his father was living, and in that part of the country; that he did never serve under this indenture, which he said he was constrained to sign while he was in gaol on a charge made by Hunter and Stockdale before another magistrate.

The objections taken to the commitment of Robertson were—

1st. That the justice had no jurisdiction—Robertson not being an apprentice within the statute, the indenture not having been executed according to its provisions, Robertson being a minor and the indenture void; and because he was under duress, and the indenture falsely ante-dated, and he was not serving under it when he committed the alleged offence in departing.

2ndly. The warrant does not shew him to be an absconding apprentice, or that he was found within the justice's jurisdiction; and because

3rdly. The warrant does not shew that any complaint was made on oath to the justice.

4thly. The warrant does not state that any evidence was taken, or that Robertson was present when any was given.

5thly. Nor of what he was convicted, or what satisfaction or security was required of him, or to what amount, or in what manner, or by whom to be entered into.

6thly. That the warrant does not shew that the justice adjudged anything specific respecting the security or satisfaction, by giving which Robertson should obtain his discharge.

7thly. Because the statute provides for a different mode of proceeding.

8thly. That it does not appear by the warrant that Robertson was an apprentice in any respect under the act, or that the articles were entered into under or in accordance with the act of Parliament.

9thly. That the evidence does not support the conviction or commitment, but shews that he left the service of the complainant at the time charged, by his leave; and it is not alleged that he was absent without lawful excuse, or that he refused to serve out his apprenticeship, but the contrary.

Richards shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We have no doubt this rule must be made absolute. The statute extends, we think, only to such indentures of apprenticeship as the act itself authorizes, or at most to such other indentures as may constitute a contract legally binding upon the apprentice. This is not a case of that kind, the articles being executed only by the minor, who by the common law could not bind himself, and not by any person or public authority empowered by this or any other statute to bind him.

And the conviction was besides clearly bad; and the warrant, which in truth constituted the conviction, is illegal, not

being sustainable on the 6th clause of the statute for *two* months' imprisonment, nor under the 7th, because the justice did not determine what satisfaction should be given to the master; so that in fact sending him to prison till he should give the "required security to make satisfaction," without specifying anything more either as to the security or satisfaction, amounted to an absolute imprisonment for two months, which was not authorized by the statute. Upon the point whether any conviction could properly take place under the 7th clause during the apprenticeship, we need not give any opinion.

Rule absolute for quashing the conviction.

HEWARD V. MITCHELL ET AL.

Assignment of personal property—Sale or mortgage?—Consideration—Registration—Affidavit by one of several vendees—12 Vic. ch. 74, 13 & 14 Vic. ch. 62.

Held, that the deed of assignment in this case (the particulars of which are set out in 10 U. C. R. 535) must be considered as an absolute sale, not a mortgage, and therefore did not require to be refiled under 12 Vic. ch. 74. An assignment or sale of personal property upon trust to pay creditors (or upon other trusts) is within the statutes requiring registration; and the consideration for such assignment is "*bona fide*" within the meaning of those acts, though some creditors may thereby lose their debts, for a debtor is allowed by law to pay in whatever order he may think proper. When there are several bargainees of goods, the affidavit to accompany registration required by 13 & 14 Vic. ch. 62, is sufficient if made by one.

This was an interpleader suit. The facts and purport of the deeds executed by the traders, out of which the present questions arose, are reported in 10 U. C. R. 535.

A special case was made, in which it was agreed between the parties that there was no such change of possession of the property as contemplated under the statutes 12 Vic. ch. 74, and 13 & 14 Vic. ch. 62. The plaintiff's execution issued on the 6th of April, 1852. The deeds under which the defendants claimed as assignees of the property were registered in the office of the clerk of the County Court on the 7th of November and 10th of November, 1851, respectively. These deeds were never refiled, nor any copy filed at the expiration of the time limited by the statute 12 Vic.

ch. 74. The affidavits upon the original filing made by one of the bargainees was to this effect :—" W. McM., of, &c., one of the parties of the second part in the indenture of which the annexed is or purports to be a true copy named, and also one of the bargainees therein named, maketh oath and saith, that the sale of the personal estate, goods, chattels, and interests, in the said indenture and in the annexed copy mentioned, is *bona fide* and for good consideration, being made in order to reimburse this deponent and J. M., the other party of the second part named in the said indenture and copy, for certain liabilities to which they have subjected themselves by reason of having endorsed for the party of the first part in the said indenture and copy named, for the sake of accommodation, and without having received value therefor, and also for the purpose of liquidating other just debts due by the said party of the first part in the said indenture and copy named, to the said deponent and to J. M., and also to other parties who are creditors of the said party of the first part, and who are to be benefited hereby. And this deponent further saith that the said indenture of sale is not made for the purpose of holding, or enabling this deponent and the said J. M. therein named, or either of them, to hold the goods, personal estate, chattels, and interests, in the said indenture and in the annexed copy mentioned, and hereby assigned, or any other personal estate, goods, chattels, or interests, against the creditors of the said bargainor or party of the first part as aforesaid; but on the contrary, for the benefit of the creditors, according to the effect and provisions of the said assignments."

The questions submitted for consideration upon the facts were—1st. Whether the deeds had been registered in compliance and accordance with the provisions of the statutes; 2ndly. Whether such registration, if sufficient, rendered a change of possession unnecessary; 3rdly. Whether the omission to refile the deed rendered the sale void as regards the plaintiff.

Vankoughnet, Q. C. for the plaintiff.

A. McDonald for the defendants.

BURNS, J., delivered the judgment of the court.

The transactions as between the debtors and the defendants, as contained in the deeds—namely, that the business might be carried on for the space of three years, and that was no discharge given to the debtors, but they remained liable though the property assigned was not sufficient to meet the debts—may be said in some respects to resemble a mortgage rather than a sale: yet when it is necessary to determine whether it is in fact the one or the other, we can have no hesitation in pronouncing that the transfer of the property in this case was a sale. It is true the price was not determined at the time of the sale because the sale was upon trust to resell for the best prices and upon the most advantageous terms, even to the giving of *credit, as is customary in such cases, or as the defendants should consider just and reasonable under the circumstances*. So soon, however, as the property was sold and the expenses deducted, which the deeds provided for, then the price at which the sale to the defendants was made became fixed and determined (a). Various trusts are annexed to the sale and transfer to the defendants, which they were bound to perform; but the distinctive character of a mortgage,—namely, that the property is merely delivered in pledge, and that upon payment of the debt, the pledge shall be returned, is wanting in this case. No doubt if after the execution of the deeds the debtors had found the means, and offered to pay the debts to pay which the transfer was made, a court of equity, in case of refusal on the part of the defendants to reconvey, would have interfered and compelled them to do so. That, however, would not have been done on the ground that the transaction was a mortgage but because the defendants though having a beneficial interest in the property for themselves and others, yet stood in the position of trustees for the debtors, and accountable to them; and if the whole object and end of the trust were answered by payment of the debts, the court would not allow it to continue

(a) See on this point *McBride v. Silverthorne*, ante page 545.

but would terminate the matter by directing a reconveyance. In order to be a mortgage it must be so by the agreement of the parties, and the court can not make it so for them merely because a variety of trusts are annexed which may be said to give the transaction the resemblance of a mortgage. The right to redeem the pledge which is the ingredient rendering the transaction a mortgage must be created expressly by, or of necessity flow from, the agreement of the parties. Every mortgage in a certain sense is a sale; but when there is a right to redeem the sale is considered at law only conditional until forfeiture, and in equity, upon certain rules until decree of foreclosure. The statute 13 & 14 Vic. ch. 62, enacted that certain words which place sales upon the same footing with mortgages, as to be in writing and the instrument being filed when the sale is not accompanied by immediate delivery and an actual and continued change of possession shall be read as if added to the end of the first section of 12 Vic. ch. 74. A sale therefore was something differing from a mortgage, and undoubtedly meant a sale without there being a right to redeem, though there exist trusts which would give a court of equity jurisdiction to interfere, applying principles which govern as between trustees and the *cestuis que trust*. The third section of 12 Vic. ch. 74 is expressly confined to mortgages being again filed within thirty days before the expiration of the year. We can only suppose the legislature thought it was right that in cases where a right to redeem existed, the mortgagee should in order to protect the property from other claimants, keep that right alive from year to year by refiling his security. A sale being once made there is no existing right to protect a *security*; and the only question can be whether the sale in the first instance be a *bonâ fide* one; or in cases where the sale is accompanied by trusts, whether they be still existing or are fulfilled. In this case there was no necessity to file the deeds or a copy of them at the expiration of the year.

The main question between the parties to this suit is, whether there was a compliance with the law in the registration of the deeds, so that the plaintiff's execution could not attach upon the property, it being admitted that there

was no such change of possession as contemplated by law. This point depends upon two questions which have been raised ; first, as to the sufficiency of the affidavit attached to and filed with the deeds ; and secondly, whether it is sufficient, when there are more bargainees than one, for one of them only to make the affidavit. The enactment of the statute is, that in case of an absolute sale the affidavit shall state "that the sale is *bonâ fide*, and for good consideration (setting it forth), and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor." It is argued that the nature of the affidavit shews the legislature did not mean trust deeds to be within the operation of the act. The previous words of the clause certainly are in no way restrictive, but it says *every sale*, and this would include sales upon trusts as well as others. A sale to one in order to pay his debt, and to pay other debts, either *pari passu* or by way of preference, is a *bonâ fide* consideration. When the legislature further said the holding was not to be against the creditors of the bargainor, it must be intended to be in a case where the consideration was not *bonâ fide*, otherwise there would be an inconsistency, or an intention to exclude a certain class. I have already said the previous words of the clause will embrace every sale, and the terms of the affidavit should be so construed as to be consistent with that, unless indeed it be apparent there was an intention to apply the provisions of the act partially, or that the words bear no other construction than to say there is an intention to exclude one class of sales, or an omission of something which inevitably produces that result. The act must be construed also with relation to the law existing at the time it is passed and, as Baron Rolfe has said, "the law leaves it open to a debtor to make his own arrangement with his several creditors, and to pay them in such way as he thinks proper." Every sale in case of a debtor about to break up because of insolvency must have the effect of operating against some creditors ; but that is not the sense in which the expression is used by the legislature, but it must be read in connection with the circumstances which state the consideration ; and

if the consideration be *bona fide* according to the existing law, the transaction is not void because though it means some creditors are prevented from being paid. Admitting the truth of what the deeds contain, and that it is also true what is stated in the affidavit, then we are of opinion that a *bona fide* consideration for the sale is shewn, and that the affidavit in that respect is sufficient.

With respect to the point, whether it is necessary that all the mortgagees or bargainees named in the instrument should make affidavit to the *bona fides* of the transaction, we must consider what is the equity of the statutes. Of course the singular number used—that is, *mortgagee or bargainee of such goods*—will, under the Interpretation Act, (12 Vic. ch. 10), include any number filling those positions; and then, reading it as meaning such, it is necessary that there should be *an affidavit* of all—or, reading the words *an affidavit* in the same manner, should there be *affidavits* of all the mortgagees or bargainees? The recital in 13 & 14 Vic. ch. 62, is that the former statute required to be amended, amongst other things, so as to require an affidavit that the mortgages and conveyances mentioned in the former, and the bills of sale in the latter act were *bona fide* and just, and not for the purpose of protecting such goods against the creditors of the mortgagor or bargainor. The making of such an affidavit does not of course prevent any person contesting the validity of the transaction; the affidavit is only required for the purpose of affording information as to grounds upon which the claim to the goods is made, and one affidavit embracing the requisites of the statute affords that information as well as affidavits for twenty bargainees, if there were so many, would do. If the instrument were rendered unquestionable upon the requisite affidavit being made, then no doubt it would be proper to exact an affidavit from every bargainee named; but that is not so. and the language of the recital clearly shews that the legislature only contemplated *an affidavit* to be made; and the latter words designate by whom it is to be done. In complying with the requisites of the statute as to the person, it may be done, we think, by one of several as well as by all, and that the legislature

never intended to impose the necessity upon all to do so; and we are by no means compelled to put a construction upon the act as to require all the mortgagees or bargainees to join in making *an affidavit*, or that several affidavits should be made if more bargainees than one in order to the due and effectual registration of the instrument.

Judgment should therefore be entered for the defendants.

Judgment for defendants.

JOINER ET AL V. COLBORNE.

Deed—Agreement—Description of premises.

The defendant entered into a sealed agreement with the plaintiffs, to pay them £275 by a certain day, "for the south hundred acres of Lot 15 in the 7th concession of Norwich, beginning at the south-east corner, and run by the surveyor one hundred acres exactly."

A Chancery suit was brought on this agreement, and under a decree for specific performance the defendant received a deed describing the land exactly as in the contract.—The lots in Norwich front to the south.

It was proved that by the plaintiffs' directions the surveyor had run out the lines, beginning at the S.E. angle of Lot 15, but making the part to be conveyed only 25 chains and 53 links wide in front, whereas the width of the lot 15 was 33 chains and 30 links, and therefore, in order to include the necessary quantity of land, the depth was greater and the width less than would have been the case if *the south hundred acres* had been in fact described, running across the whole width. The plaintiffs had gone into possession of the strip to the west not conveyed but forming part of the *south hundred acres*, and had occupied for five or six years, and the defendant had taken possession of that part to the north included by the survey but not forming part of *the south hundred acres*, and had put up his farm buildings there.

Held, that the plaintiffs could not dispossess him of this part, on the ground that the deed conveyed only *the south hundred acres*; but that he was entitled to the tract as "run by the surveyor," that being in accordance with the substance of the agreement, and the latter words being the principal feature of the description, not the words "*the south hundred acres*."

EJECTMENT for part of the south half of Lot 15 in the 7th concession of Norwich, 30 acres, being the part of the said lot adjoining the south hundred acres.

The defendant made defence for the land as above described in the writ, provided that such part of the south half, &c., be included in any part of the following description, which description, he said, embodied all that he owned in the said lot No. 15, *i. e.*, commencing at the south east angle of the said lot No. 15, in the said 7th concession: thence south 78° 30" west, 25 chains and 53 links; thence north 11° 30"

west 39 chains and 17 links; thence north $78^{\circ} 30''$ east 25 chains and 53 links, to the west side of the road allowance between Lots 14 & 15; thence south $11^{\circ} 30''$ east 39 chains and 17 links, to the place of beginning."

At the trial at Woodstock, before *McLean, J.*, it was admitted that the plaintiffs were formerly the owners of the whole lot No. 15, of which the land in question formed part, and that the whole lot contained 275 acres.

On the 19th of August, 1848, the defendant entered into a sealed agreement with Thomas and Charles Joiner that he would pay to T. C. Street, Esq., £275, by the first day of May, 1849, "*for the south hundred acres of Lot 15, in the 7th concession of Norwich, beginning at the south-east corner and run by the surveyor one hundred acres exactly.*" The two Joiners had bargained with Mr. Street to buy the whole lot from him, and they were to procure the title from Mr. Street and convey to the defendant the part above described, on his making the payment mentioned. On the 11th of April, 1853, Thomas Joiner having died in the mean time, Charles Joiner his son and heir, with the Charles Joiner who was a party to the agreement (being the two plaintiffs in this case), executed a deed of bargain and sale, in which the agreement of the 19th of August, 1848, was recited, and it was further recited that the plaintiffs had received a title to the whole lot from Mr. Street, and had been paid by the defendant the sum which he had engaged to pay by his agreement; and it was further recited in this deed, that by a decree of the court of Chancery, made on the 21st of January, 1853, in a suit between these parties, it was ordered that the agreement of the 19th of August, 1848, should be specifically performed and that the master should settle the form of conveyance to be executed by these plaintiffs. And then by this deed, which it was declared had been executed under the direction of the master, these plaintiffs granted, bargained, and sold, to the now defendant, in fee, "all and singular that certain piece or parcel of land and premises, situate in the township of Norwich, being composed of *the south 100 acres of Lot No. 15, in the 7th concession of Norwich, beginning at the*

south-east corner of the said lot, and run by the surveyor one hundred acres exactly."

It will be seen that this deed conforms precisely with the agreement in regard to the premises conveyed, giving no more particular description of the land than by calling it "*the south 100 acres of the lot 15, beginning at the south-east corner of the said lot, and run by the surveyor one hundred acres exactly.*" No plan was attached to the deed.

The lot 15, it appeared, contains a very large surplus above its supposed contents; the width of the lot being in fact 33 chains and 30 links.

It was proved that some time in 1848—whether before or after the agreement made on the 19th of August of that year was not stated—the plaintiffs employed one Tidy, a surveyor, to run out the 100 acres which they said were to be conveyed to the defendant. They told the surveyor that the width of the tract was to be 25 chains and 53 links, and desired him to survey and lay out such a portion of the lot from the front, taking that to be the width and measuring back from the south-east angle, as would make the 100 acres.

The surveyor laid out the 100 acres accordingly, pursuant to the direction of the plaintiffs, the defendant not being present. He laid out 39 chains and 17 links along the eastern side line of the lot, it being necessary according to the width given him to lay out the tract of that depth; and then he measured across the lot 25 chains 53 links, to correspond with the front, then down to the southern boundary in a course parallel with the side line, and then along the southern boundary to the place of beginning. The plaintiffs represented that to the surveyor as the portion of the lot which they were to convey to the defendant or rather Thomas Joiner, who was then living, and the elder Charles Joiner (one of the present plaintiffs) so represented the matter. The lot is in truth 7 chains and 77 links wider than the 25 chains and 53 links given to the surveyor by the plaintiffs as the width of the tract to be laid out, and if, in laying out the 100 acres, the surveyor had been instructed to include the whole width of the lot, then the tract

would have been 33 chains and 30 links wide in front, and the distance back would have been only 30 chains and 3 links, instead of 39 chains 17 links.

After the survey Thomas Joiner occupied the strip of 7 chains 79 links on the west side of the front of the lot, being the excess in width above the 25 chains 53 links, and the defendant went into possession and occupied the land as laid out by Mr. Tidy, the surveyor employed by the plaintiffs. For all that appeared, they might have been all under the impression that the tract laid out covered the whole front of the lot.

The plaintiffs then, after possession had been held five or six years, brought this action to dispossess the defendant of such land as would be found to be next adjacent to and north of the south 100 acres, if such 100 acres be laid out from the front across the whole width of the lot. This would take from the defendant about 23 acres and one-third of the northern portion of the tract laid out by the surveyor, which he had occupied ever since the survey was made, and would deprive him, it was said, of his buildings, which he happened to have erected on that part of the tract which he supposed he had bought. Of course, if the plaintiffs should recover upon the principle that the deed conveyed the south 100 acres of the lot literally speaking, the defendant would as a consequence be entitled under that construction to an equal quantity of land to the west of his present line.

The learned judge desired at the trial to reserve the question upon the construction of the deed for the determination of the court, expressing his own opinion to be that what the deed called for was not the south 100 acres of the lot literally, and without any qualification, as the plaintiffs assumed, but the south 100 acres "*run by the surveyor, beginning at the south-east corner of the lot,*" and that the plaintiffs could not dispossess the defendant of that which the surveyor had by their instructions run out as the south 100 acres. Ultimately, however, no leave to move was reserved, and the jury found their verdict for the defendant.

Eccles moved for a new trial on the law and evidence.—*Galt* shewed cause in the first instance.

ROBINSON, C. J., delivered the judgment of the court.

This seems to us to be a plain case. The Court of Chancery was careful not to depart in the slightest particular from the words of the agreement, of which they decreed a specific performance; and it would seem just to construe the deed made under the direction of the court in such a manner as to give to the language of the description the very same effect as we should give to the same words if we were construing them with reference to the agreement, because the evident purpose of the deed was to vest in the defendant the very land which the agreement had assured to him.

Now what did the agreement assure to him? Not "the south 100 acres of the lot" simply and absolutely, without anything being added that could qualify or explain it, but the south hundred acres of the lot, beginning at the south east corner of the lot, "*and run by the surveyor 100 acres exactly.*" This seems, according to the natural construction, to refer to an operation that had actually been performed on the ground by a surveyor, for the purpose of showing beyond dispute what land the one was agreeing to sell and the other to buy, though it might have been otherwise; the survey might not have been made on the 19th of August, 1848, the date of the agreement, and the intent might have been that the exact quantity was to be measured off by a surveyor before the deed should be given. In that case the agreement would have been more correctly expressed if it had said according to a line "*to be run*" by a surveyor.

The learned judge, however, who tried the cause, reports that Mr. Tidy the surveyor had been called in by the Messrs. Joiner, and had at their request actually made the survey, and marked out the land upon the ground, before the agreement of the 19th of August, 1848, was executed. That being so, we consider that the agreement must be taken to refer to the land so measured out, and that those are the 100 acres to be conveyed, though they do not form literally *the* south 100 acres, but are rather 100 acres of the southerly part of the lot.

After the plaintiffs have by their own act marked out what they call the south 100 acres, contemplated by them

as the subject of the agreement, and after referring to the tract so run by the surveyor as the land which they intend to convey ; after they have put the defendant in possession of that tract, and have seen him build upon it and improve it ; and have gone themselves into possession of the tract which they now desire to force upon him, thus treating it as land not covered by the contract of sale, they cannot, we think, be allowed to sustain this action on the ground that what the surveyor employed by themselves had marked out on the ground was not what they agreed to sell.

They are held in law, in our opinion, as well as in equity to what we take to be the substance of their agreement ; that is, to convey the tract which by the survey they referred to had been marked out as the land to be sold under the designation of the south 100 acres, such tract being in truth 100 acres off the south part of the lot, though not the very southern 100 acres. The plot referred to as surveyed under their own instructions, is what we think must govern such survey, forming what we should regard as the principal feature of the description, and not the words "*the south one hundred acres*," which turn out not to be a correct description of that plot. Under this construction the defendant gets no more than his proper quantity, and he gets only the land which all parties supposed he had contracted for.

We think the verdict was proper, and that this rule should be discharged.

Rule discharged.

REGINA V. TINNING.

Plying steamboat on Sunday—"Travellers"—8 Vic. ch. 45 secs. 1, 3.

The defendant was held liable under 8 Vic. ch. 45 for plying with his steamboat on Sunday, between the city of Toronto and the Peninsula—persons carried between those places not being "*travellers*" within the meaning of the exception in the act.

The defendant was convicted before the police magistrate of the city of Toronto of exercising his ordinary calling by plying his steamboat on Sunday between the wharves of the city and the Peninsula, contrary to the statute 8 Vic. ch. 45.

On appeal to the Recorder's Court *James Boulton* moved to arrest the judgment, on the ground that the defendant must be considered within the exception in the statute as "conveying travellers by water."

The case was reserved for the opinion of this court, under 14 & 15 Vic. ch. 13.

Richards supported the conviction.

J. Boulton contra.

ROBINSON, C. J., delivered the judgment of the court.

We think that under the 1st and 3rd sections of the statute 8 Vic. ch. 45, it was unlawful for the defendant to ply in pursuit of his ordinary calling backwards and forwards between the city and the peninsula with his steamer on the Lord's Day.

In point of mere grammatical construction there could be no room for question, because the words "other persons" would comprehend all persons following an ordinary calling as well as those particularly enumerated; but the case of *Sandiman v. Breach* (7 B. & C. 97) and the few others that have come before the court in England under the statute 29 Car. II. ch. 7, for the better observance of the Lord's Day, lay it down, that the words "all other persons" though literally extensive enough to include all persons following an ordinary calling, must yet be construed to refer to persons *ejusdem generis* with those enumerated, which I confess does not seem to me to afford us the means of drawing any definite line.

But here the Legislature have used the word "merchant," which is rather higher in the scale than any in the English statute; and the exception expressed in the first clause of our statute, of persons employed in conveying travellers or Her Majesty's mails, by land or water, will really not suffer us to doubt that persons making it their ordinary business to ply within the harbour of a town, not for any purpose of carrying travellers or the mail, were intended to be restrained by the act. We think it clear that the persons carried on a Sunday between the city and peninsula cannot be called travellers within the meaning of the exception. They are persons notoriously seeking mere recreation, and

if placed under proper regulations, a recreation perhaps salutary and proper to be allowed at hours when it could not interfere with attendance upon public worship; but that is a point on which we know opinion to be much divided, and if the Legislature should think proper to tolerate it they will feel it necessary, we suppose, to modify the act, which does not in our opinion permit us, as it stands at present, to declare this case to be within the exception in the statute, while it does appear to us to come within the prohibitory clause.

We think therefore that the order must go to give judgment upon the conviction.

Conviction affirmed.

A DIGEST

OF

ALL THE REPORTED CASES.

DECIDED IN THE

COURT OF QUEEN'S BENCH,

FROM EASTER TERM 16 VICTORIA, TO
HILARY TERM 17 VICTORIA.

ACCEPTANCE.

Of Stock, when necessary to complete transfer.]—See Stock.

ACCOMMODATION NOTE.

See MONEY PAID.

ACCOUNT STATED.

See PLEADING 8.

Promissory note—Account stated—Evidence.]—The plaintiff declared on the following as a promissory note—"Three months after date, we or either of us promise to pay to Elias S. Reed (the plaintiff) or John Fraser, his guardian, at the Post Office, Embro, £119 17s. Cy., value received in rent of farm," adding a count on account stated. It was proved that the defendant had been in possession of plaintiff's farm before and after the note was made, which was given for rent due, and that the plaintiff was abroad at the

time of making the note. Held, that the writing, though not a promissory note, would support a recovery for the plaintiff under the account stated. Held, also, that evidence was inadmissible of a verbal understanding that the note was not to be enforced until the plaintiff's return, or until he should send a power of attorney to some one to collect the note. Reed v. Reed, 26.

AFFIDAVIT.

Entitling.]—An affidavit in support of an application to quash a by-law was not entitled in any court, and there was nothing to shew that it was sworn before an officer of any court, the commissioner styling himself merely "A commissioner, &c." Held insufficient. In re Hiron et al. and the Municipal Council of Amherstburgh, 458.

For registration, may be made by one of several bargainees of goods.]—See Bill of Sale.

AGREEMENT.

See DAMAGES, 1.—CONSIDERATION.

—FRAUDS (Statute of).—ILLEGALITY—LEASE.—PARTNERS AND PARTNERSHIP.—PAYMENT.

Agreement — Construction.] — 1. *Held*, that upon the agreement set out below, the plaintiff (the deputy sheriff) was entitled only to his share of the fees actually received by the sheriff, or in his office; except with regard to such fees as might not have been collected owing to some act or omission of the sheriff. *James Fraser v. Simon Fraser*, 109.

Building contract—Extra work.] — 2. The defendant employed the plaintiffs to construct a house under a building contract, in which it was stipulated that there should be no charge for extra work unless specially ordered in writing by the architect employed. The defendant himself having requested the plaintiffs to do certain work on the building, and desired the plaintiffs' men to take their orders from him and not from the architect, *Held*, that for this work the plaintiffs might recover in an action on the common counts, without reference to the contract. *Melville et al. v. Carpenter*, 128.

Contract—Sub-contractor—Pleading.] — 3. Declaration in assumpsit. The second count stated that section 59 was laid out on a certain portion of the O. S. & H. R. R., and the defendant had contracted with Messrs. S. & Co., the contractors with the company for making the said road; and in consideration that the plaintiff would do certain work on said section at the prices and rates in the first count mentioned, the defendant promised the plaintiff that he should, in a reasonable time after making his contract, have possession of the said section, to enable him to go on with his work: that the plaintiff commenced the work and a large

portion thereof, and frequently requested the defendant to put him in possession of the remaining portion of said section, to enable him to complete his contract. The breach assigned was that it was not in the power of the defendant to give the plaintiff possession when so requested, and that the said R. R. Co. changed and altered the line of road, so that the said section was located at a place and on a line different from that on which it had theretofore been. *Held*, on demurrer declaration bad: for it appeared that the change of line had been made by the company, and the plaintiff's agreement with the defendant was subject to the conditions of the defendant's original contract. *Summers v. Geary*, 134.

Agreement — Sub-contractors for work on railroads bound by the measurement of the company's engineer.]

— 4. The plaintiffs entered into an agreement with the defendant, a contractor with the Great Western Railroad Co., by which they undertook to perform certain work at the rate of 6d. currency per cubic yard according to the estimate of the engineer in charge of the work. The engineer proved that the work had been measured by him, and that the plaintiffs had received the full amount due to them according to this estimate. The plaintiffs called another witness, a civil engineer, who swore that he had also measured the work done by the plaintiffs, and found it to be more than it was estimated at. *Held*, that the plaintiffs were bound by the measurement of the company's engineer and that his report was conclusive upon them, as it ought to be, for the defendant would himself be obliged to adhere to it in his claims against the company for the same work. *Jarvis et al. v. Dalrymple*, 399.

Certainty. — 5. An agreement that A. shall saw certain logs and deliver the lumber at his mill to B as soon as

he is able to do so, such sawing to be paid for immediately on delivery, is not void for uncertainty. *O'Donnell v. Hugill et al.*, 441.

Contract for sale of goods—No specific price mentioned—Receipt—Evidence.—6. A contract to sell wheat and deliver it at the buyer's mill within a reasonable time, the seller to receive whatever may be the highest market price at the time when he shall demand payment, is valid; for, though no specific price is fixed, it may be ascertained at any time by the method agreed upon, and will then have relation back to the original contract.

The plaintiff agreed verbally with the defendant to sell and deliver wheat to him on the terms above stated, and on delivery he received a receipt, signed by defendant's miller, as follows:—"Received in store from Joseph McBride for Mr. do. do. 51 bushels fall wheat, at —s. d." &c. *Held*, that the words of the receipt expressing the wheat to have been received '*in store*' did not preclude the plaintiff from proving an absolute sale on the terms above set forth. *McBride v. Silverthorne*, 545.

Agreement—Construction of—"Therefrom."—7. In consideration that the plaintiff would deliver to the defendant 2,000 bushels of wheat, the defendant promised to deliver to him, "within a reasonable time *therefrom*," 500 barrels of flour. *Held*, that the word *therefrom* must be construed to mean *thereafter*, and not that the flour was to be made from the identical wheat delivered. This being the proper construction of the agreement, it was clearly no defence to plead that the defendant's mill containing the wheat was burnt down without any negligence on his part; though he would have been excused in that case if the other construction of the agreement could have been adopted. *Tilt v. Silverthorne*, 619.

Deed—Agreement—Description of premises.—8. The defendant entered into a sealed agreement with the plaintiffs, to pay them £275 by a certain day, for "the south hundred acres of Lot 15 in the 7th concession of Norwich, beginning at the south-east corner, and run by the surveyor one hundred acres exactly." A Chancery suit was brought on this agreement, and under a decree for specific performance the defendant received a deed describing the land exactly as in the contract.—The lots in Norwich front to the south. It was proved that by the plaintiffs' directions the surveyor had run out of the line, beginning at the S.E. angle of Lot 15, but making the part to be conveyed only 25 chains and 53 links wide in front, whereas the width of the Lot 15 was 33 chains and 30 links; and therefore, in order to include the necessary quantity of land, the depth was greater and the width less than would have been the case if *the south hundred acres* had been in fact described, running across the whole width. The plaintiffs had gone into possession of the strip to the west not conveyed but forming part of the *south hundred acres*, and had occupied it for five or six years, and the defendant had taken possession of that part to the north included by the survey, but not forming part of the *south hundred acres*, and had put up his farm buildings there. *Held*, that the plaintiffs could not dispossess him of this part on the ground that the deed conveyed only the *south hundred acres*; but that he was entitled to the tract as "run by the surveyor," that being in accordance with the substance of the agreement, and the latter words being the principal feature of the description, not the words "*the south hundred acres*." *Joiner et al. v. Colborne*, 631.

ALDERMAN.

Disqualified as contractor with Corporation.—See Municipal Elections, 2.

ALIENAGE.

Alienage--Jay's treaty--4 Geo. IV. ch. 21.—The patentee of the lands in question died in 1813, leaving two brothers—John, the father of the lessor of the plaintiff, and Richard, through whom the defendant claimed. John was born at Detroit in 1769. After a visit of some years to Montreal he returned to Detroit, and lived there till 1792, about which time he went into the employment of some merchants in Montreal who were trading in the West. After this engagement was put an end to he remained at Michillimackinac until 1795, when he removed to St. Louis in the United States, where he married and resided until his death in 1841, the plaintiff being born in that country. While there he held various public offices, which it seemed could by law be held only by American citizens, though the practice was otherwise. It was objected that under these circumstances he was an alien; or that at all events the plaintiff, his son, was so, and therefore incapable of inheriting; but *Held*, that John Hay, being a natural-born subject, could not lose his rights by residing in a foreign country, or by holding office there: that he was not affected by the second clause of the treaty of 1794 (commonly called Jay's treaty), for that relates only to those persons residing within the jurisdiction of the posts referred to in the treaty at the time of their evacuation in 1796. That the plaintiff, as the son of a natural-born subject, was within the 4 Geo. II., ch. 21, which applies as well to Roman Catholics as to Protestants; and that he was therefore entitled to recover. *Doe dem. Richard Hay v. Hunt*, 367.

APPEAL.

Notice not complying with 27th rule, effect of.—The defendants, appealing from a decision refusing a new trial, in their notice under the 27th appeal rule merely stated generally that the judgment was erroneous as being against law and evidence, and because the jury were misdirected. The court held this not a compliance with the rule, and ordered that execution might issue. *Quære*, however, whether such order was necessary, as the notice, not being in accordance with the rule, could not take effect as a super-seedeas. *Torrance v. McPherson*, 200.

APPRENTICE.

14 & 15 Vic. chap. 11, secs. 6, 7—*Illegal conviction.*—1. The defendant, a justice of the peace, convicted one R., an apprentice, of having absented himself from his master's service without leave, and adjudged that he should *give sufficient security to make satisfaction to his master, according to the statute 14 & 15 Vic. ch. 11, and in default of such satisfaction be imprisoned in the common gaol for two months, unless the said satisfaction should be sooner given.* The conviction was quashed—*first*, because the articles of apprenticeship were not within the act, for it appeared that the apprentice was a minor, and the articles not executed by any one on his behalf; and *secondly*, because it could not be sustained under the sixth clause of the act for two months' imprisonment; or under the seventh clause, because the satisfaction to be given was not ascertained. *In re Regina v. Robertson*, 621.

APPROPRIATION OF PAYMENTS.

See PAYMENT.

ARBITRATION AND AWARD.

See EVIDENCE, 3.

Appointment of umpire—Surrender of term.—1. The plaintiff held from the defendant a lease of a farm, for a term of years unexpired. The plaintiff and defendant, with D. and M., entered into a bond by which the four became bound to each other in £200, with a condition reciting that "the parties to these presents have mutually agreed to separate from each other, and cancel all arrangements heretofore made, and leave all matters and controversies existing between them, either at law or in equity, to the arbitration and decision of Mr. Thomas Duncan and Mr. Patrick Durning, indifferently chosen, and should they not agree, to choose an umpire, whose decision should be final." These four parties named signed the bond, but only two seals were affixed, and it seemed that all four touched the seals. The two arbitrators not agreeing, appointed an umpire, who awarded that the defendant "shall release and give up to O'Dougherty" (the plaintiff) "the term of years, as agreed to in the submission, and also deliver up the stock of farming utensils in proper order, and without further delay; and that the lease then held by both parties of said farm be immediately cancelled." *Held*, that the submission bond was not to be considered as in itself a surrender of the term, but imported only that the parties had submitted it to the arbitrators to put an end to the lease upon such terms as they should think right; that even if the intention of the parties were otherwise, the term would not be surrendered, for the bond could not be held to be such a deed as is required by 14 & 15 Vic. ch. 7, sec. 4; that the award would not amount to a deed of surrender by the defendant, as required by the statute—and therefore that the plaintiff could not eject the

defendant. *Held*, also, that by the terms of the award the umpire should have been appointed by the parties, not by the arbitrators. *O'Dougherty v. Fretwell*, 65.

Evidence.—2. The plaintiff and defendant having a dispute about an agreement between them, after talking over the matter in presence of one M., referred it to him to determine; and M., having heard their statements, awarded that the defendant should pay to the plaintiff £25. Subsequently, at the request of the plaintiff's attorney, he made a written award to the same effect, and delivered it to the parties. The plaintiff having sued as upon a verbal submission: *Held*, that it was not necessary to produce the written award, as it appeared from the testimony of the arbitrator that the verbal decision was in fact his award and so intended. *Davis v. McGivern*, 112.

Uncertainty—Reference to third parties.—3. All differences concerning the renting of a farm by the defendant to the plaintiff, and all other matters in dispute between them, were referred to arbitrators, who awarded that the hay in the defendant's barn cut by the plaintiff, after deducting the hay borrowed by the plaintiff in the then last spring, and a quantity of hay out of it sufficient to winter all the stock in the plaintiff's possession belonging to the defendant, should be divided between them equally: that the straw grown by the plaintiff on the place of the defendant should be equally divided between them: that the fattening pigs then in possession of the plaintiff should be killed and equally divided, and that the two brood sows and pigs should be equally divided: and in order that an equal division of all these things should be made as above described, they ordered that the defendant and the plaintiff should select two disinterested per-

sons from the neighbouring farmers whose decision should be final. And they further awarded the sum of £150 cy. to be paid to the plaintiff by the defendant on or before the 1st February, 1852, &c., &c. *Held*, that the award was bad for the delegation to third parties, and for uncertainty; and that the plaintiff could not recover the sum directed to be paid to him, that part of the award not being separable from the rest. *Harrington v. Edinson*, 114.

Unauthorized conditions imposed.]

—4. The defendants gave to the plaintiff and her husband a bond in £500, of which one condition was that if the plaintiff should survive her husband they would maintain her in her house during her life, and supply her with all necessaries. For the breach of this condition an action was brought, and *the matters in difference in the cause* were referred at Nisi Prius. Under this reference the arbitrators awarded that the defendants should pay to the plaintiff £500 on or before the 20th of November, 1852, in full of the causes of action for which the suit was brought, and of all matters in dispute referred; and *the arbitrators further awarded* that the plaintiff should not proceed to enforce the payment of the said £500 as above mentioned, provided the defendants should respectively give to the plaintiff good security on real estate for the payment to her of the following sums—that is to say, provided S. H. should, *on or before the 1st of December, 1852*, give to the said plaintiff a mortgage on certain land named, securing to her the payment of £250 on default in the following payments, *i. e.* £12 10s. on 1st January, 1853, and from the said 1st January the sum of £12 10s. annually, by quarterly payments, during her life; and provided also that H. H. should, on the 1st of December, 1852, secure in like

manner by mortgage on certain lands named, £166 13s. 4d., to be paid in case of his default in making certain quarterly payments amounting to £8 6s. 8d. annually; and provided that A. H. should secure, as before, £94 6s. 8d. in case of his default in paying £4 3s. 4d. annually. The plaintiff declared on this, in an action of debt, as an award “that the defendants should pay to the plaintiff £500 on or before the 20th of November, 1853.” The defendants denied the award as stated, and in another plea set it out and alleged that it was void on the face of it, as being beyond the authority of the arbitrators. *Held*, that the defendants were entitled to a verdict, for there was no absolute claim to the money on the 20th of November, as stated in the declaration, but the right of action was suspended until the 1st of December, and would then depend on the execution of the mortgages as directed. *Held*, also, that the award was void, as the arbitrators had exceeded their power in giving damages which could not have been recovered in the cause, and in imposing conditions beyond their authority. *Azenath Hill v. Alvin Hill, Sylvester Hill and Herman Hill*, 262.

Power of arbitrators.]—5. Where a reference is general, as of a contract and all matters relating to it, the arbitrators have power to name a day for paying the money; though it is different where only the matters in dispute *in a cause* are to be decided upon. *Addison v. Corbey*, 433.

ARREST,

See MARRIED WOMAN, 1.—MONEY PAID.

ARREST OF JUDGMENT.

See CONVICTION.—PRACTICE, 1.—
VENIRE DE NOVO.

ARSON.

See MALICIOUS PROSECUTION.

ASSUMPSIT.

See DECEIPT.—NEW ASSIGNMENT.

To recover purchase money on sale of lands for taxes.]—See Sheriff, 2.

ASSURANCE.

See INSURANCE.

ATTACHMENT.

See DETINUE—MALICE—MALICIOUS PROSECUTION, 2, 3,—REPLEVIN, 2.

Attachment from Division Court, on what grounds to be issued—Discrepancy between 64th clause of 13 & 14 Vic. ch. 53, and form of affidavit in schedule D.] 1. In trespass for taking goods the defendant justified under an attachment from a division court of Lincoln and Welland, which he averred to have been issued on his (the defendant's) affidavit that the plaintiff was about to abscond from this province, or leave the said counties of Lincoln and Welland, with intent and design to defraud him of his said debt, taking away personal estate liable to seizure under execution for debt. Held, on demurrer, plea bad—the affidavit neither averring those facts which by the enacting clause of the statute are made the conditions on which an attachment may issue, nor answering to the form of affidavit given in the schedule to the act. *Semble*, as there is a material difference between the enacting clause and the form of affidavit given, that the former must govern. *Boyle v. Ward*, 416.

Attaching creditors in Division Court—Rights of, as against other creditors.]—2. Goods in the hands of a Division Court clerk under an attachment are not protected against an execution issuing from a superior

court before the attaching creditor has obtained his judgment. The sheriff, therefore, is justified in seizing such goods; but *quære*, if the seizure were illegal, whether an action on the case would lie at the suit of the attaching creditor against the sheriff and the plaintiff in the execution. *Francis v. Brown et al.*, 558.

ATTORNEY.

See LIMITATIONS (Statute of), 2.

BAIL.

Held (before the passing of 16 Vic. ch. 179) that magistrates were not liable for refusing to admit to bail on a charge of misdemeanor, in the absence of any proof of malice. *Conroy v. McHenry*, 439.

BANKRUPT.

See INSOLVENT AND INSOLVENCY, 2.

BILL OF SALE.

See DEBT.

Assignment of personal property—Sale or mortgage?—Consideration—Registration—Affidavit by one of several vendees—12 Vic. ch. 74, 13 & 14 Vic. ch. 62.]—Held, that the deed of assignment in this case (the particulars of which are set out in 10 U. C. R. 535) must be considered as an absolute sale, not a mortgage, and therefore did not much require to be refiled under 12 Vic. ch. 74.

An assignment or sale of personal property upon trust to pay creditors (or upon other trusts) is within the statutes requiring registration; and the consideration for such assignment is "*bond fide*" within the meaning of those acts, though some creditors may thereby lose their debts; for a debtor is allowed by law to pay in whatever order he may think proper. When there are several bargainees of goods, the

affidavit to accompany registration required by 13 & 14 Vic. ch. 62, is sufficient if made by one. *Heward v. Mitchell et al.* 625.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See ACCOUNT STATED.—EVIDENCE, 2, 4.—HUSBAND AND WIFE.—MARRIED WOMAN, 2.—MONEY PAID.—NEW TRIAL, 1.—PLEADING, 3, 5.—SATISFACTION AND DISCHARGE.—SUNDAY.

Promissory note—Error in notice of non-payment—Subsequent promise to pay.] A notice of non-payment of a note received by defendant, the first of four indorsers, stated the date and parties correctly, but described it as for £28, instead of £25. It was shown that after the notice, the defendant had promised to pay. The learned judge of the county court directed the jury that the notice was insufficient, and that the subsequent promise to pay could not avail, as it was not averred in the declaration. *Held*, a misdirection both points. *Thompson v. Cotterell*, 185.

BOND.

See CONDITION.

BRITISH AMERICA ASSURANCE COMPANY.

See STOCK.

BUILDING AGREEMENT.

See AGREEMENT, 2.—PLEADING, 7, 9.

BY-LAW.

See AFFIDAVIT.—MUNICIPAL CORPORATIONS.—PLEADING, 1.—PRACTICE, 3.

Proof of by-law—12 Vic. ch. 196, sec. 34—*Claim for interest as on stock paid up.*]—1. The defendants were sued on a by-law, alleged to have been made by them, enacting that all persons who at the time of sub-

scribing should pay up their stock in full, should be entitled to interest on the amount of their investment. The defendants' book of by-laws was produced, in which this by-law was written out, but not sealed, and in the margin was written "expunged," signed with the President's initials. *Held*, that such proof, even without the entry in the margin, would have been insufficient to shew a by-law; and *semble*, that the claim could only have been supported by an engagement under the corporate seal. But it was also *held*, that the plaintiff (under the facts stated in the next case, page 271) was not a subscriber within the meaning of the alleged by-law, and therefore it was not necessary to determine whether such by-law was proved. *McDonald v. Ontario, Simcoe, & Huron Railroad Union Company*, 267.

By-law to establish a road quashed for uncertainty.]—2. A by-law to establish a road was in these terms:—"Be it enacted, &c., that the new survey made by Mr. A. M. Holmes, commencing at the Pine Hill road on lot 37, Lake road east, running south-westerly, south of the old lake road, until it strikes the old Lake road on lot 52, be, and it is hereby established and constituted a public road. And be it further enacted, that the said road shall be four rods in width."

Held, that the road to be established was not sufficiently defined, and that the by-law must be quashed for such uncertainty. *McIntyre v. The Municipal Council of Bosanquet*, 460.

CARRIER.

Carriers by water—"Dangers of Navigation"—*Collision*—*Pleading.*)—Case against the defendants, as carriers by water, for negligence in conveying the plaintiff's goods.

2nd plea, goods not delivered *modo et forma*. 3rd plea—That the defendant received the goods on an express agreement that they were not to be in any wise answerable for any loss or damage which might occur in the course of the carriage or delivery; and that the damage happened without any negligence or want of care on the part of the defendants or their servants. It was proved that the loss was occasioned by collision on the lake; and that the plaintiff by his agreement was subject to the risks of navigation. *Held*, That the second plea denied only the delivery of the goods; but that on the third plea the defendants were entitled to a verdict. *Crofford v. Browne et al.*, 96.

CERTAINTY.

See AGREEMENT, 5, 6.—ARBITRATION AND AWARD, 3.—BY-LAW 2.

In a conviction]—See Apprentices.

CERTIORARI.

Habeas Corpus—Certiorari.]—A *habeas corpus* will not be granted to bring up a prisoner under sentence of conviction at the Quarter Sessions for larceny; nor a *certiorari* to remove such conviction, for there can be no *certiorari* after judgment *Regina v. Crabbe*, 448.

CHATTEL MORTGAGE.

See BILL OF SALE—DEBT.

Registration of chattel mortgages—Necessity for subscribing witness—Time of re-filing—Statement of interest—12 Vic. ch. 74.]—The statute 12 Vic. ch. 74 provides that chattel mortgages, under certain circumstances, shall be void as against creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage "or a true copy thereof, together with an affidavit of a witness thereto" of the due execution of the mortgage, or of the due execution of

the original in case of a copy, shall be filed as directed by the act; and also that every mortgage or copy thereof so filed shall cease to be valid against such purchasers or mortgagees after the expiration of one year from the filing thereof, "unless within thirty days next preceding the expiration of the said term of one year a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed," shall be again filed. *Held*, that it was not essential that the affidavit of execution should be of a *subscribing* witness; and that where the original had no subscribing witness, but in the copy filed the name of the person who made the affidavit was inserted as a witness, the variance was not material.—*Robinson, C. J.*, dissenting. *Held*, also, that where the first filing was on the 15th of May, 1852, a re-filing on the 14th of May, 1853, was clearly in time. *Held* also, that no affidavit is necessary to verify the statement of the mortgagee's interest required by the act. *Armstrong v. Ausman*, 498.

CLERK.

Of the Court of Chancery, protected, against perverse verdicts.]—See New Trial, 3.

COMMISSION TO EXAMINE WITNESSES.

Refused.]—1. It is not imperative upon the court to grant a commission to examine witnesses out of their jurisdiction; and in this case—where a suit was pending in Lower Canada for a claim arising there, and the plaintiff, having found one of the defendants here, served him with process upon the same cause of action, and desired the evidence of a witness in Montreal—the application was refused. *Mair v. Anderson*, 160.

2. A material witness for the plaintiff, being present during the

assizes, stated that he was obliged to go to the United States on business; and on affidavit of this fact a commission was applied for, and granted, and the witness examined. The defendant's counsel objected to the issuing of the commission, and refused to cross-examine, as he had no opportunity of consulting with his client, but he attended at the trial and made the best defence he could. It being very important, under the circumstances of the case, that this witness should be subjected to a cross examination, the court granted a new trial on payment of costs. *Arnold v. Higgins*, 191.

COMMISSIONER FOR TAKING AFFIDAVITS.

See AFFIDAVIT.

COMMON SCHOOLS.

Case for exclusion from School—Evidence of residence within school section.—1. *Held*, that under the evidence in this case it was sufficiently shewn that the plaintiff was a resident of the school section from the school of which his son had been excluded, for which exclusion this action was brought. *Washington v. The Trustees of the School Section number 14, in the Township of Charlotteville*, 569.

Coloured people—Separate schools—12 *Vic. ch.* 83; 13 & 14 *Vic. ch.* 48.]—2. Residents of a school section in which a separate school has been established for the class to which they belong—as in this case, for coloured people—are not entitled to send their children to the general common school of such section. *In re Dennis Hill v. The School Trustees of Camden and Zone*, 573.

COMPANIES.

See GALT AND GUELPH R. R. Co.—GRAND RIVER NAVIGATION COMPANY.—GREAT WESTERN R. R.—ONTARIO, SIMCOE, AND HURON R. R. Co.—RAILWAYS AND RAILWAY COMPANIES.

CONDITION.

Bond—Condition.—The defendant gave to the plaintiff a bond conditioned *not to alter his will*, by which, as recited in the bond he had devised to the plaintiff certain land. He afterwards sold and conveyed the land to one C. *Held*, that the condition was broken. *McCormick v. McRae*, 187.

CONDITION PRECEDENT.

See PLEADING, 9.

CONFESSION OF JUDGMENT.

See FRAUD.

CONSIDERATION.

See BILL OF SALE,—EVIDENCE, 2, 4. FRAUD,—ILLEGALITY.—SUNDAY.

It is not necessary that any consideration should be stated for the acceptance of a substituted agreement, for the consideration for the first contract is regarded as continuing and applicable to the second. *O'Donnell v. Hugill et al.* 441.

CONTRACT.

See AGREEMENT.

With Corporation a disqualification for office of Alderman.—See Municipal Elections.

CONVEYANCE.

See AGREEMENT, 8.—ESTATE.

CONVICTION.

See APPRENTICE.—CERTIORARI.—QUARTER SESSIONS.

Qui tam action for not returning conviction—Conviction illegal—Staying proceedings—Arrest of judgment—4 & 5 *Vic. ch.* 12, 12 *Vic. ch.* 81, sec. 7.]—1. The defendant, a justice of the peace, with two other justices, convicted one D. S. of having refused to serve as returning officer at an election, and fined him 20s. It was afterwards discovered that this was not the

first election for the ward, and therefore that the conviction was illegal. The conviction was not returned to the next quarter sessions; and thereupon, though after the return made, this action was brought for the penalty awarded by 4 & 5 Vic. ch. 12. *Held*, on motion for a nonsuit, that the illegality of the conviction was no defence; but that, if on that account the fine had not been levied, a return should have been made explaining the circumstances. *Quære*, whether the declaration would not have been bad on motion in arrest of judgment, for charging the offence to be that the defendant did not make a return to the next ensuing court of general quarter sessions, instead of an immediate return, as the statute requires. *Quære*, also whether the court, if promptly applied to, would have stayed the proceedings, the action being brought after the defendant had returned the conviction. *O'Reilly qui tam v. Allan*, 411.

CORONERS.

See REPLEVIN, 3.

CORPORATION.

See MANDAMUS.—MUNICIPAL CORPORATIONS.

COSTS.

See DIVISION COURT, 1.—MONEY PAID.

13 & 14 Vic. ch. 53, sec. 78.]—1. Where a case had been improperly brought in this court, and a verdict rendered for an amount within the division court jurisdiction—*Held*, that the judge had no power to order county court costs, the suit not having been commenced there. *Cameron v. Campbell*, 159.

42 Eliz. ch. 6—Costs.]—2. Declaration for trespass and false imprisonment averred that the defendant assaulted the plaintiff, and seized and laid hold of him, and pulled and

dragged him about, and forced and compelled him to go from a certain dwellinghouse to the common gaol, and there imprisoned the plaintiff, and detained him in prison, &c. The defendant pleaded, first, not guilty; and secondly, thirdly, and fourthly, as to the assaulting the plaintiff, and keeping and detaining him in prison, special pleas of justification under writs of *ca. sa.* and *ca. re.* The rejoinders to the replications to the second and third pleas were demurred to. A verdict was given for the plaintiff, and contingent damages assessed at 12s. 6d. *Held*, that a battery was not admitted on the pleadings, and therefore that a certificate might be granted under 42 Eliz. ch. 6, to deprive the plaintiff of costs. *Jones v. Marshal*, 204.

COUNTY COURT.

See EXECUTION.—NOTICE OF TRIAL.—PENAL ACTION.

COURT.

See RECORDER'S COURT.

COVENANT.

See DEBT.—DECEIT.—TAXES, 1.

CROSS-EXAMINATION.

See COMMISSION TO EXAMINE WITNESSES, 2.—EVIDENCE, 5.

DAMAGES.

See TAXES, 1.

Breach of contract — Damages recoverable.]—1. Assumpsit on a contract to make and deliver two pairs of burr mill-stones. Breach, their insufficiency and bad quality. The jury, in addition to the cost of new stones, allowed certain separate sums for money expended in attempting to repair the broken stones, for dressing them, and for injury caused by their breaking to the machinery of the mill; damages being specially claimed in

declaration on these counts. *Held*, that the verdict was sustainable as to the last two items, but not as to the first, *Colton v. Good*, 153.

2. In an action of trespass for taking timber, the court refused to disturb the verdict of the jury, on the ground that the damages were beyond the value of the logs taken. *Flint v. Bird and Corby*, 444.

DEBT.

Not maintainable—*Promise to pay not sufficiently expressed*]—The plaintiff gave to the defendant a bill of sale of certain timber, in which was contained a proviso for making the same void in case the defendant should pay to the plaintiff £300 and interest on a day named; and it was added, "but if default be made in payment of said £300 in part of the whole, contrary to the manner and form aforesaid, then it" (the bill of sale) "shall remain and be in full force and virtue." *Held*, on demurrer, that debt would not lie, the deed not sufficiently importing a promise to pay. *McLaughlin v. Brouse*, 609.

DEBTOR.

See INSOLVENT AND INSOLVENCY.

DECEIT.

Defective title—*Sale by Agent*—*Assumpsit against him to recover back the purchase money, not maintainable under the facts.*]—Where on a sale of land there has been a conveyance perfected, unless fraudulent mis-statement or concealment is clearly made out, there can be no action except on the covenants, and where there are no covenants, or none that will extend to the cause of eviction, there can be no action against the vendor. *Semble*, that where fraud is established, but the conveyance has been made, and the parties cannot be placed in *statu quo*, then the remedy is by an action for deceit, and as-

sumpsit for money had and received, to recover the purchase money, will not lie. *Held*, that on the evidence set out below, the defendant was not shewn to have been guilty of fraudulent misrepresentation or concealment of title. In this case the defendant was not the person who conveyed the land or had the beneficial interest. He acted in making the sale, and received the moneys, merely as agent for the trustees of his wife and his wife's sister, and before action brought he had paid it over. *Quære*.—Whether under these circumstances an action would lie against him, or whether the principal should not have been sued, so that he might defend his own title. *Thomas v. Crooks*, 579.

DECLARATIONS.

Under 5 & 6 W. IV. ch. 62.]—*See* Evidence 5.

DEDICATION.

See HIGHWAY.

DEED.

See AGREEMENT, 8.—BILL OF SALE. DIVISION COURT, 1.—REGISTRATION.

DESCRIPTION OF PREMISES.

See AGREEMENT, 8.

DETINUE.

Not maintainable.]—The defendant, having a claim against one R., sued out an attachment from a division court under which he directed the bailiff to seize certain goods in the house where R. was living with the plaintiff, and he was present when such seizure was made. The goods were placed by the bailiff in the custody of the clerk of the division court, in whose possession they continued until the bringing of this action. *Held* that as the goods were seized in the

possession of the defendant in the attachment, an action of *detinue* could not be maintained against this defendant, even admitting the goods to have been all the time under his absolute control, without shewing that the plaintiff had made him acquainted with her claim and demanded to have them given up. *Clark v. Orr*, 426.

DEVIATION.

See INSURANCE, 2.

DISCLAIMER.

See MUNICIPAL ELECTIONS, 2.

DIVISION COURTS.

See ATTACHMENT.—COSTS, 1.—JUDGMENT.—MALICE.—MALICIOUS PROSECUTION, 2, 3.—NOTICE OF ACTION, 5.—REPLEVIN, 2.

Jurisdiction of Division Courts—“Torts to personal chattels.”—13 & 14 Vic., ch. 53, sec. 23—*Application by defendant to set off excess of costs, under sec. 78.*—1. In an action of trover for a deed the jury gave a verdict for £24 16s. It was ordered on motion, that a new trial should be granted, unless the plaintiff would accept nominal damages, and he thereupon consented that the verdict should be so reduced. The court, under these circumstances, refused an application to compel the plaintiff to enter judgment and tax his costs, or allow the defendant to do so for him, in order to set off the costs of defence and recover the excess over the plaintiff's verdict and taxable costs—*first*, because it is not clear that an action of this nature is within the jurisdiction of the Division Court; and, *secondly*, because the verdict was not reduced until after the trial and the plaintiff therefore had no opportunity to apply for a certificate which perhaps he might otherwise have obtained. *Ginn v. Scott*, 542.

Division Courts—Suits by infants in—13 & 14 Vic. ch. 53, secs. 23, 27.]—2. The 27th clause of 13 & 14 Vic. ch. 53, does not restrict infants from suing in the division courts for anything but wages, but was intended only to enable them to recover for their own labour, contrary to the principles of the common law. *Ferris v. Fox*, 612.

DOWER.

Evidence of seisin.—1. *Held*, that the evidence in this case was insufficient to establish the husband's seisin, which was denied on the pleadings; but on the affidavit filed the court granted a new trial on payment of costs. *Wannacott v. Fillater*, 49.

Dower.—2. Action for dower in lands of demandant's late husband no suggestion on the record that the husband died seized. Pleas—1. That the tenant is and always has been ready to render dower. 2. *Tout temps prist*, and a tender of dower and refusal before action brought. Replikation to first plea, praying judgment of demandant's dower to be assigned to her: to second plea, a demand and refusal by tenant—the rejoinder to which was demurred to. *Held*, that upon this record there could be no assessment of damages. *Hawkshaw v. Hodgins*, 71.

Where mortgage term outstanding.—3. D. S. being seised in fee of certain lands, executed a mortgage for 999 years to one Sheldon, who took possession. D. S. afterwards conveyed in fee to W. C.; and after W. C.'s death the premises were sold to defendant at sheriff's sale under a judgment against him. His widow then sued for dower. *Held*, that she should have judgment for her dower with a *cessat executio* during the term; but *semble* that in order to authorize a *cessat executio* the facts respecting

the term should have appeared on record. And *quære*, if defendant had satisfied the mortgage, and had not taken an assignment of it or made any provision for keeping it alive, what would have been the plaintiff's rights? *Chisolm v. Tiffany*, 338.

DUPLICITY.

See PLEADING, 11.

EJECTMENT.

See ALIENAGE.—ARBITRATION AND AWARD, 1.—ESTOPPEL.—LEASE.—LIMITATIONS [Statute of] 1.—MESNE PROFITS.—MORTGAGE.—PRACTICE, 2.

Application to restrain plaintiff from taking possession of part of the land recovered—Statute of Limitations.—1. This court will not interpose summarily to deprive a plaintiff in ejectment of the full benefit of his writ, by restraining him from taking possession of part of the premises recovered, except in a very plain case. Where, therefore, the defence urged was one under the Statute of Limitations, and unjust under the circumstances, and there had been contradictory evidence, and no misdirection, they refused to interfere. *Hemmingway v. Hemmingway*, 317.

Ejectment by mortgagee—Application to stay proceedings under 7 Geo. II. ch. 20.—2. To support an application by a defendant in ejectment under 7 George II. ch. 20 to stay proceedings on payment of the mortgage money such defendant must be the person *who has the right to redeem*; and therefore, where the motion was made by the tenant of an assignee of a lease for years from the heir of the mortgagor, the rule was refused. But, independently of this ground, the facts, as set out in the affidavits, were such as would prevent the court from interfering summarily. *McDonald v. Doray*, 318.

ELECTIONS.

See MUNICIPAL ELECTIONS.

ENTITLING OF AFFIDAVIT.

See AFFIDAVIT.

ESTATE.

See WILL.

Under a conveyance "to B. S. and her children for ever," there being no children at the time of the deed: *Held*, that the grantee took only a life estate.

ESTOPPEL.

See MUNICIPAL ELECTIONS, 1.—PLEADING, 10.—RIGHT OF WAY.—SHERIFF, 1.

Ejectment—Estoppel—14 & 15 Vic. ch. 114.]—1. At the trial of an ejectment, under the new act, a former recovery was proved in favour of John Doe on the demise of the now defendant, against the now plaintiff; and it appeared that the question there decided, being one of boundary, was precisely the same as that again brought up in this case. *Held*, clearly no estoppel, for that judgment was between different parties, and under the old practice. *Quære*, whether the late act 14 & 15 Vic. ch. 114, has altered the effect of a recovery in ejectment, as regards estoppel. *Semble*, per BURNS, J., that, under the 8th section, it has not, *when the finding is for the claimants*. *Clubine v. McMullen*, 250.

EVIDENCE.

See ACCOUNT STATED.—AGREEMENT, 6.—ARBITRATION AND AWARD, 2.—BY-LAW, 1.—COMMISSION TO EXAMINE WITNESSES.—COMMON SCHOOLS, 1.—DOWER 1.—FALSE IMPRISONMENT.—INDICTMENT.—MALICE.—MALICIOUS PROSECUTION, 1.—NOTICE OF ACTION, 6.—REPLEVIN, 1.

Action by road company for tolls.—Evidence of incorporation and defendants' joint liability.—1. Action by Joint Stock Road Company, incorporated under 12 Vic. ch. 84, against stage proprietors, for tolls. The plaintiffs proved that the defendants had used the road with their stage coaches, and had paid tolls; that in former negotiations for settling this claim they had acted as recognizing a joint liability; that the advertisements put out by them were of a joint concern; and that their horses were employed over the whole route, though among themselves the line was divided into portions, and the fares distributed accordingly. *Held*, that the defendants' joint liability, and the incorporation of the plaintiffs, were sufficiently shewn. *Paris and Dundas Road Company v. Weeks et al.*, 56.

Proof of consideration.—2. Assumpsit by the indorsee against the maker and first and third indorsers of a promissory note. The third indorser let judgment go by default. 5th plea—by the maker and first indorser—That the note was made and indorsed by defendants,—setting out circumstances, owing to which, before the note was indorsed to the plaintiff, and before the commencement of this suit, the defendant, by agreement with R.G. and O.G. (the second and third indorsers, made, and indorsed, and delivered to them another note, which, was accepted in full satisfaction and discharge of the note sued upon, but which note remained in the hands of the said R. G. and O. G. without the fault of the defendants,—with an averment that there never was any value or consideration for the indorsement by the said R.G. and O.G. to the plaintiff. *Replication*—That the plaintiff took the note for a good and valid consideration, and became and is the holder thereof in good faith. *Held*, that on this issue the introductory

facts were admitted, and the proof of consideration lay on the plaintiff. *Maulson v. Arrol et al.*, 81.

Obstruction of water-course.—Evidence not supporting declaration.—Fence viewers—8 Vic. ch. 20, secs. 12, 13.]—3. The plaintiff and defendant owned adjoining lots in the township of G. There had been for some years a drain or ditch across the defendant's land into which the water was led by another ditch from the front part of the plaintiff's land. The plaintiff, in order to drain a newly cleared field, at the back of his farm, opened a small ditch connecting the field with the old drain across the defendant's land; and at the same time for the purpose of shortening the water course, he cut off an angle of the old drain. He then applied to the persons acting as fence viewers for the township to examine and award, as between him and the defendant, how the draining of their lands should be arranged; and, both parties attending, they examined the lands, and by a written award ordered in what manner the drainage should be in future provided for; and that until these arrangements were completed, the drain lately cut by the defendant should be allowed to remain open. This award was not carried out; and in the following year the fence viewers were again called upon, and made a second award, in some respects differing from the first. The defendant then placed a dam across the small ditch by which the plaintiff had shortened the course of the old drain, and through which the water had been running from the plaintiff's field; and for that obstruction this action was brought. The declaration stated that the plaintiff was of right entitled that the water collecting upon his land should be drained off, and run from thence into and through a certain drain called

the "old drain," from thence through other drains into the river J.; yet that the defendant, well knowing, &c., placed large quantities of earth, &c., across the said drain, and thereby obstructed the same, and penned back the water upon the plaintiff's land. The jury found for the plaintiff, and 6d. damages, saying that their verdict was founded upon the award. *Held*, that the evidence did not support the case declared upon, and that a verdict must be entered for the defendant; for it was not "the old drain" which was obstructed (as stated in the declaration), but the new cut made by the plaintiff; and as to the award, the effect of that was only to allow this new cut to be kept open for a certain time; whereas the verdict, if sustained, would establish a right in the plaintiff to keep "the old drain" open for ever. *Held*, also, that it was unnecessary to prove the regular appointment of the fence viewers; and that their award was binding under 8 Vic. ch. 20. *Malone v. Faulkner*, 116.

Promissory note—Illegal consideration.—4. To support a plea that a note was given in consideration of a forbearance to proceed in a prosecution for felony, the particular nature of the charge should be proved. *Henry v. John Little and William Switzer*, 296.

Declarations under 5 & 6 Wm. IV. ch. 62, sec. 15.—5. In an action of assumpsit for work done for the defendant in Scotland, the only evidence given by the plaintiff was his own declaration, and that of three others, made at Glasgow, under 5 & 6 Wm. IV. ch. 62, sec. 15, taken before a justice of the peace. There was no authentication of the signature of the justice, or any proof of their being such a person, or of his holding this office. No notice has been given to the defendant of

the intention to produce such evidence; and he swore that the demand was unfounded, and that he believed he would be able to disprove it, if he could have the means of cross-examining the plaintiff's witnesses, and of adducing evidence on his own behalf. Under these circumstances the court granted a new trial on the ground of surprise; reserving the question of costs, and expressing no decided opinion as to the sufficiency of the evidence so taken, though they condemned the incautious provisions of the statute. *Quære*, however, whether, under the provisions of the statute as to the effect to be given to such evidence, the want of an might not be taken as a ground opportunity for cross-examination for rejecting it altogether. *Smith v. McGowan*, 399.

6. *Semble*, That the statute law of a foreign country may be proved by the oral evidence of a lawyer from thence. *Arnold v. Higgins*, 446.

EXECUTION.

See REGISTRATION, 1.

Under 16 Vic. ch. 175, a County Court judge can order immediate execution in cases sent down to him by writ of trial as well as in other cases; the 53rd clause of 8 Vic. ch. 13, being in the effect overruled. *Riach et al. v. Hall*; and *Patterson v. Hall*, 356.

FALSE IMPRISONMENT.

Trespass for false imprisonment—Justification—Evidence of writ set aside.—In trespass for false imprisonment the defendant justified under a writ of *capias* from a county court. The plaintiff replied, that by an order of the judge of the county court the writ of *capias* in the plea mentioned was set aside, and the plaintiff discharged from custody, on

account of the insufficiency of the affidavit to hold to bail. The defendant rejoined, denying that the writ was so ordered to be set aside, or that it was void and of no effect, and on this issue was joined. It appeared that the judge's order was *that the defendant should be discharged from custody, and the arrest set aside*, on account of the insufficiency of the affidavit. *Held*, that on the issue raised the plaintiff must fail, for the arrest might be set aside and the writ still remain in force. *Quære*, whether an action of trespass is maintainable when the arrest only is set aside, and the writ left untouched. *James v. Ellis*, 449.

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FALSE RETURN.

To Fi. Fa.—*See* Pleading, 10.

—♦—
FARRIER.

See LIEN 2.

—♦—
FENCES.

Obligation to make and maintain.]
—*See* Great Western R. R. Co. 1.—
Ontario, Simcoe, & Huron R. R. Co., 4.

—♦—
FENCE VIEWERS.

See EVIDENCE, 3.

—♦—
FOREIGN LAW.

How proved.—*See* Evidence, 6.

—♦—
FRAUD.

See DECEIT.—INSURANCE.

Money lent to assist escape from creditors—Security taken therefor.]
—A security taken for a *bona fide* loan of money is not fraudulent and void, merely because the money was lent to enable the borrower to leave the country in order to escape from his creditors.

C. being involved went to K.,

and informed him that H., a creditor, was pressing him, and he must leave the country. K. lent him money to enable him to get away, took a confession of judgment payable immediately, entered judgment, and issued execution, on which the sheriff seized C.'s goods which he had left behind. The day following the execution H. sued out an attachment against the estate of C. as an absconding debtor. *Held*,—the *bona fides* of the loan not being disputed—that the object for which the money was advanced would not deprive K. of the benefit of his judgment as against H. *Hall v. Kissock*, 9.

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FRAUD (STATUTE OF).

See LEASE,

Promise to pay the debt of another.]
—The plaintiff declared on a promise to pay two quarters' rent due on certain premises which had been leased by the plaintiff to one G., the consideration being that the plaintiff would forbear to distrain. It appeared that when the promise was made only one quarter's rent was due. *Held*, that the case of *Williams v. Thomas* (10 B. & C. 664) was in point—that the promise, being void as to the first quarter's rent by the fourth section of the Statute of Frauds, was void altogether; and that the plaintiff must be nonsuited. *Hall v. Denholm*, 354.

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GALT & GUELPH RAILWAY COMPANY.

See QUO WARRANTO.

—♦—
GRAND RIVER NAVIGATION COMPANY.

Power of to interfere with mills, &c.—4 W. IV. ch. 13, secs. 2, 3, 5.]—
Declaration in case for wrongfully keeping up certain dams, and for wrongfully increasing the height of

the same, and thereby penning back the water of the Grand River, and causing it to flow against the plaintiff's mills and over his premises. *Plea*, That the grievances complained of were necessarily required for the purpose of the navigation of the said Grand River, and were within the limits on that river within the control of defendants; and that the plaintiff's mills were first built after the act incorporating the defendants came into effect; wherefore the defendants, under the power given to them by the act, lawfully kept up the said dams, &c. *Held*, on demurrer, plea good, for their act of incorporation authorizes the defendants to do the acts complained of and justified. *Kerby v. The Grand River Navigation Company*, 334.

GREAT WESTERN R. R. CO.

See PLEADING, 6.

Obligation to erect fences—4 W. IV. ch. 29—14 & 15 Vic. ch. 51.]—1. Under 4 W. IV., ch. 29, sec. 9, the Great Western Railroad Company are bound to put up sufficient fences along their line of road while the work is in progress. *Quære* as to how far this duty is incumbent on companies under the Railway Clauses Consolidation Act. *Bradley v. The Great Western Railway Company*, 220.

Right of, to enter upon lands—4 W. IV. ch. 29, secs. 2, 3, 4, 5, 11; 9 Vic. ch. 81, sec. 26.]—2. *Held*, That under 4 W. IV. ch. 29, the G. W. R. R. Co. might enter upon land for the purpose of their road, and could not be treated as trespassers for such entry, though they would be liable to make compensation. *Sommerville v. the Great Western R. R. Co.*, 304.

GROWING TIMBER.

See REGISTRATION, 2.

HABEAS CORPUS.

See CERTIORARI.

A habeas corpus will not be granted to bring up a prisoner under sentence at the quarter sessions for larceny. *Regina v. Crabbe*.

HIGHWAY.

See BY-LAW, 2.—PLEADING, 1.—RIGHT OF WAY.

Highway—Dedication—13 & 14 Vic. ch. 15, sec. 1.]—1. One H. owned a block of land fronting on Elizabeth street, in Toronto, and running back to the centre of the block between Elizabeth and Teraulay streets. In laying out this land, he ran a street or lane of forty feet from Elizabeth street to the limit of his own property, which was not then enclosed or separated from the land adjoining; a short time after and about 17 years ago, M., the owner of the adjoining land to the east, fronting on Teraulay street erected a fence to enclose his own land, running across the head of this lane. H. had nothing to do with the putting up of this fence, and there was no concert between him and M. as to the plan of survey, or the laying out of their respective properties. G., owning land bought from M. abutting on the head of the lane, threw down the fence, so as to make a thoroughfare to his own premises; the defendants—occupying lots on the lane purchased from H., and contending that G. had no right to convert the lane into a thoroughfare to his own lot,—re-erected the fence a few inches west of the line of that pulled down; and thereupon G. procured them to be indicted for nuisance in obstructing a public highway. A verdict of guilty was directed, subject to the opinion of the court under the facts above stated. *Held*, that the jury should have been directed to find whether the lane, when first laid out, was dedicated by

H. to the public as a highway generally, or whether with reference to the statute 13 & 14 Vic. ch. 15 sec. 1, there was an express reservation of any right by him.—*Robinson, C. J.*, dissenting and holding that the defendants were entitled to an acquittal, on the ground that the evidence failed to shew any dedication by H. to the public beyond the limit of his own property, and that they were therefore justified in restoring the fence. *Regina v. Spence et al.*, 31.

Niagara Falls Ferry—Obstruction of road to—Ordnance Department.]—2. *Held*, that under the facts stated in this case, the defendant being the lessee of the Ordnance Department had no right to obstruct the road leading to the Niagara Falls Ferry, and that he was guilty of a nuisance in so doing. *Regina v. Davis et al.*, and *Regina v. Fralick*, 340.

HUSBAND AND WIFE.

See MARRIED WOMAN.

Misjoinder.]—Where a married woman, during her husband's absence from the country, lent to defendant a sum of money taking the following acknowledgment—"19th June, 1849. I, the undersigned, owe Mrs. Charlotte Rischmuller, at Stratford, the sum of three hundred dollars"—and in an action on this writing brought on the common counts only *by the husband and wife*, the jury found that it was the husband's money lent by the wife. *Held*, that the wife was improperly joined, and that the plaintiffs must be non-suited. *Rischmuller et ux. v. Uberhaust*, 425.

ILLEGALITY.

See FRAUD.—SUNDAY.—USURY.

Agreement — Illegality.]—The plaintiff declared on a special agreement, not under seal that in consideration that the plaintiff then

being a bailiff of a division court *would do his duty as the law directed* in seizing and selling crops on the farm of one K., on account of a certain judgment obtained by defendant against one M., he, the defendant, then promised the plaintiff to indemnify him against all risk that might arise in relation *to his doing his said duty*: That he did afterwards, *as the law directed*, seize and sell the crops on the said farm, by virtue of a warrant issued on said judgment, and that afterwards several persons claimed on the said goods sued the plaintiff, and recovered a verdict of £50, which he had been obliged to pay—yet that the defendant, having notice of all this refused to indemnify according to his agreement—A verdict having been found for the the plaintiff, *Held* on motion to arrest judgment that the declaration sufficiently shewed that the plaintiff was required to do something which might possibly turn out not to be illegal. *Held* also, that sufficient consideration appeared for the promise. *Robertson v Broadfoot*, 407.

IMMEDIATE EXECUTION.

See EXECUTION.

INCORPORATION.

Evidence of.]—*See* Evidence, 1.

INDICTMENT.

The production of the original indictment is insufficient to prove an indictment for felony; but a record must be made up with a proper caption. *Henry v. Little et al.*, 296.

INFANTS.

See DIVISION COURTS, 2.

INN-KEEPERS.

See LIBEL AND SLANDER, 1.—LIEN, 1.

INNS AND TAVERNS.

See MUNICIPAL CORPORATIONS.

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 INSOLVENT AND INSOL-
 VENCY.

*Assignment by prisoner after judgment—Effect of, on application for discharge—*10 & 11 Vic. ch. 15.—5 W. IV ch. 3.]—1. A debtor applying for his discharge under 10 & 11 Vic. ch. 15, must shew that he has not since judgment disposed of his effects in any way so as to defeat the creditor's remedy: an assignment after judgment, for the benefit of creditors generally, will therefore prevent him from obtaining his discharge. *Quære*, whether such an assignment would affect his claim to the privilege of gaol limits. *Aitkin et al. v. Bullock and Pentland*, 19.

*Bankrupt and Insolvent Debtors' Acts—*7 Vic. ch. 10, sec. 15, 8 Vic. ch. 48, secs. 1, 5, 24, 29.]—2. *Quære*, whether a person having failed before the passing of the Bankrupt Act (7 Vic. ch. 10), but remaining a trader and unable to meet his engagements, could after the bankrupt law had come into force, take advantage of the Insolvent Debtors' Act. *Semble* per *Robinson, C. J.* that under the 5th section he could: *Semble* per *Draper, J.*, that he could not.

Where an order for protection as an insolvent debtor is pleaded in bar of a debt, it must be averred that such debt was included in the defendant's schedule. Although it may appear that an order so pleaded was improperly granted, being unauthorized by the statute, and might therefore have been successfully resisted—or, perhaps, afterwards cancelled by the tribunal that granted it, yet this court will not discuss its validity when set up by the debtor as a defence to an action against him. *Stephenson v. Green*, 452.

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 INSURANCE.

Statement of title—Affidavit of

loss.]—1. The plaintiff applied for an insurance with the defendants as if the property were his own, stating that it was occupied by himself and unincumbered; and he obtained a policy for two thirds of the actual value. It appeared that he was only a lessee for years of the land on which the buildings were erected. *Held*, that he had so misrepresented his interest in the property as to avoid the policy. The affidavit of loss sent in after the fire had no jurat, and was not in the form of an affidavit, and on that ground also the plaintiff was precluded from recovering. *Shaw v. St. Lawrence County Mutual Insurance Company*, 73.

Marine Insurance—Deviation.]—2. The plaintiff effected an insurance with defendant on certain wheat to be carried in a schooner from Port Darlington to Kingston and from thence to Montreal, by such boats, barges, or vessels, as might be deemed necessary and proper for the safe transport thereof. The schooner proceeded to Port Sidney about three miles below Kingston; the wheat was there transferred to a barge, which returned to Kingston in order to complete her cargo, and while so returning the barge was stranded, and the wheat lost. The plaintiff endeavoured to prove a custom in support of the course taken by the schooner, but the evidence only shewed that certain forwarders, having storehouses at Port Sidney, had been in the habit of doing as was done in this case; and it appeared that no such question as the present had ever been raised. *Held*, that such evidence was wholly insufficient, and that the policy was avoided by the deviation in the voyage. *Fisher v. The Western Assurance Company*, 255.

Policy avoided by increased risk.]—3. The plaintiff received from defendants a policy of insurance

for £750, by which they insured on a stone building £400, and on furniture and other goods therein £200—all at the rate of 8 per cent.; on a frame building £100; and on goods and tools therein £50—all at the rate of 12 per cent. One of the conditions of the policy was, “that if after insurance effected the risk shall be increased by any means whatever within the control of the assured, or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void.” It was proved that after effecting this insurance the plaintiff put up a steam engine in the frame building, and, in order to make it as safe as possible, erected a small engine house of brick at the back of the building. Some witnesses swore that if care was taken the risk would not be increased, but many swore that it would; and it was proved that the plaintiff was told by the agent of the Company that if he put up the engine he would have to apply and pay an additional premium; that he made no such application; that he endeavoured to effect an insurance at other offices, but was refused, the risk being considered too hazardous, and that he had acknowledged that he knew the policy was void because he had made no arrangement with defendants in consequence of the additional risk. The frame building was destroyed by fire which began in the upper part of it, and a portion of the goods in it were destroyed. The stone house was also much injured by the same fire, and the furniture in it partially destroyed. *Held*, that as a matter of form it was necessary to submit it to the jury whether in fact the risk was increased, but that under the facts proved, the policy was clearly avoided. *Reid v. Gore District Mutual Fire Insurance Company*, 345.

Mutual Fire Insurance Companies—Effect of double insurance on part of the property—Pleading—6 Wm. IV. ch. 18, sec. 22.]—4. One of the conditions of a policy granted by a mutual insurance company was, “that in case insurance shall subsist or be effected on the premises or property insured by the company in any other office, or from, by, or with any other person or persons, during the continuance of such insurance, the policy granted thereon by the company, shall be void, unless such double insurance subsist with the consent of the directors, signified by indorsement on the back of the policy, signed by the president and secretary.” It appeared by the pleadings that three separate sums were insured—on a building, on the machinery, and on the stock in it; and a second insurance, without the consent of the company, was effected on the building and machinery. *Held*, that by the terms of the condition, and of the statute under which these companies are incorporated, the policy was altogether avoided, and not merely as to the property so doubly insured, *Held*, also, that it was immaterial that such second insurance was with a foreign company, and therefore not capable of being enforced here, for the condition intends an insurance in fact. *Quære*, whether it would make any difference if the properties were wholly unconnected, so that a fire in one could not possibly endanger the others. A plea merely alleging that the property was insured in another office, is bad; the particulars of the alleged insurance must be stated. *Ramsay Cloth Co. v. The Johnstown District Mutual Insurance Co.* 516.

IRREGULARITY.

See NOTICE OF TAXATION.—NOTICE OF TRIAL.—PRACTICE, 3.—MUNICIPAL CORPORATION.—SHERIFF, 2.—TAXES, 2.—WAIVER.

JAY'S TREATY.

Treaty of 1794, or Jay's Treaty—Construction of.—See Alienage.

JOINT STOCK ROAD COMPANY.

Evidence of Incorporation.—See Evidence, 1.

JUDGMENT.

See NOTICE OF TAXATION.

An action is not maintainable in this court on a judgment obtained in a division court under 13 & 14 Vic. 53. *McPherson v. Forester*, 362.

JURISDICTION.

See PENAL ACTION. — DIVISION COURTS.

LEASE.

Surrender of Term.—See Arbitration and Award, 1.

Lease — Construction — Ejectment — Statute of Frauds — 12 Vic. ch. 71. Upon the following writing, not under seal: "Memorandum of agreement for lease." "W. M. for the consideration hereinafter named, agrees to demise and lease to D. H. those premises," &c., "for the period of three years certain, at ten shillings currency per day, payable monthly in advance, during said term, and with the privilege to said H. to hold the same for a further period of two years, at the same rent, payable as aforesaid. The said H. agrees to take the said premises from said H. for the price and terms aforesaid, and to pay all taxes upon the premises. Possession to be given when ever the first monthly payment of rent is made." *Held*, that H. could not maintain ejectment to obtain possession, for admitting it to be a lease, it could not be regarded as being for a term not exceeding three years from the making thereof and

so by the Statute of Frauds would require to be in writing; and therefore, without doubt, by the statute 12 Vic. ch. 71, it could, for want of a seal, take effect only as an agreement to let. *Quere*, however, whether the writing could in any case be construed as more than an agreement for a lease. *Quere* also as to the effect of 12 Vic. ch. 71, sec. 4,—whether every lease in writing must not be under seal, though not required to be written; so that a verbal lease for a year would be good, but a written lease for the same period void, if not under seal. *Hurley v. McDonnell*, 208.

But see 14 & 15 Vic. ch. 7, secs. 1 & 4 by which sec. 4 of 12 Vic. ch. 71, is repealed, and a provision is made similar to that in the English act, 8 & 9 Vic. ch. 106, viz.: that a lease required by law to be in writing, shall be void at law unless made by deed.

LIBEL AND SLANDER.

Inn-keeper — Words not actionable. — 1. The declaration charged as a libel the following words: "You have stolen goods in your house, and you know it;" and imputed as the meaning that he, the defendant, knew the goods were in his house, and were stolen. *Held*, not actionable, though spoken of and to an inn-keeper. *Patterson v. Collins*, 63.

Privileged communication—"Misappropriation." — 2. Differences having arisen between the Municipal Council of the township of Walsingham, and the Port Rowan and Tilsenberg Road Company, of which the plaintiff was a director, the defendant was appointed by a resolution of the Council to act as their attorney, and to examine the books of the company and report to the Council. The directors were then negotiating with the Trust and Loan Company for a loan of money for the purposes of the road, and the defendant, in the name

of the firm of which he was a member, wrote the following letter:

PORT ROWAN, Sept. 21, 1852.

"The Commissioners of the Trust and Loan Company, Kingston."

"GENTLEMEN:—We have been requested by three of the councillors of the township of Walsingham to inform you that a loan which they understand the directors of the Port Rowan Company are negotiating with you is made contrary not only to the wishes of the majority of the township council, but in direct opposition to the well understood wishes of the majority of the stockholders; that the directors are strongly suspected of misappropriation of the funds of the company; that they in vain endeavoured to get an account of the expenditure from the directors, and that the council are now taking measures for compelling a statement; and under these circumstances they would represent that the true interests neither of the township, nor of the Trust and Loan Company, would be forwarded by such a loan being made at present. All of which we can ourselves vouch for.

"Respectfully yours,

(Signed) FARMER & DEBLAQUIERE.

It appeared that the directors of the road company had been acting in a manner of which the council, or at least a portion of its members disapproved; that several of the members of the council had desired to have an account of the expenditure of the road funds, and were refused; that the defendant was told that a majority of the council were opposed to the loan which the directors of the company were endeavouring to effect, and was urged to interpose and prevent it. It was also proved that the affairs of the road company were in confusion, and that the council had good reason for wishing to check the proceeding of the directors.

Held, that the term "misappropriation" might be considered in its gravest sense libellous, but that in this case it was not necessary to give proof to the satisfaction of the jury of a malicious intent on the part of the defendant, for otherwise the communication would be privileged, and he would stand excused on account of his particular and legitimate connection with the subject of which he was writing.

Hanna v. DeBlaquiere, 310.

LICENSE.

To sell intoxicating liquors.—
See Municipal Corporations.

LIEN.

See TROVER.

Of inn-keeper on horses.—1. The plaintiffs owning a line of stages, entered into a special agreement with the defendant, an inn-keeper, for the stabling and feed of their horses. Some dispute arose as to the defendant's charges; and ascertaining that the plaintiffs intended to remove their horses to another inn he refused to let them go. The plaintiffs then brought trover. *Held*, that the defendant had no right of lien, as the plaintiffs were not guests, but employed the defendant in the character of a livery stable keeper, and under a special agreement which gave him no continuing right of possession. *Held*, also, that a conversion was sufficiently proved. *Dixon et al. v. Dolby*, 79.

2. *Quære*, as to a farrier's right of lien on a horse for services rendered. *Nicolls v. Duncan*, 332.

LIFE ESTATE.

See ESTATE.

LIMITATIONS (STATUTE OF).

See EJECTMENT, 1.—PRACTICE, 2.

Defence under Statute of Limitation.—1. A defence under the Sta-

tute of Limitations against a clear legal title is not one to be favoured, especially in cases between relations; and where the jury have leaned against such defence in support of the honesty of the case, and there has been no misdirection the defendant must shew very strong grounds to entitle him to a new trial on the evidence. *Hemmingway v. Hemmingway*, 237.

Action by attorney for costs.—2. In action by an attorney against his client for costs of prosecution, it appeared that the claim was barred by the Statute of Limitations, but that the lands of the defendant in the suit had been sold under a *fi. fa* sued out within six years, and bought in by this defendant, under his own execution. *Held*, that this would not revive the claim, by making the defendant accountable to the plaintiff as if he had then received the costs to his use, but that only the costs of the *fi. fa.* could be recovered. *Jones v. Hutton*, 554.

MAGISTRATES.

See BAIL.—CONVICTION.

MALICE.

See BAIL.

In an action on the case for maliciously suing out an attachment in the division court: *Held*, that the jury might with propriety infer malice from the fact of the defendant having recovered a sum less than that attached for, unless he could satisfactorily account for his having sworn to the larger sum. *Palk v. Kenny*, 350.

MALICIOUS ARREST.

See NEW TRIAL, 2.

MALICIOUS PROSECUTION.

See NEW TRIAL, 4.

Evidence.—1. Case for malicious prosecution for arson. *Held*, that under the evidence given the de-

fendant had reasonable ground for suspecting the plaintiff, and that a nonsuit was rightly directed. *Wilson v. Lee*, 91.

Pleading.—2. Case for maliciously suing out at an attachment in the division court, without any reasonable or probable cause of action in respect of the sum of money for which the attachment was issued. *Plea*—That the defendant had a reasonable and probable cause of action against the plaintiff for the sum of money in the declaration mentioned. *Held*, on demurrer, plea bad. *Sanderson v. Downs*, 99.

3. In such a case it is proper to charge in the declaration that the defendant had no reason to believe that the plaintiff was about to abscond from the *Province of Canada* (not the *Upper Province* only) for that is what must be sworn to in order to obtain the attachment. *Owens v. Purcell*, 390.

MANDAMUS.

Against a Mutual Insurance Co., refused.—A judgment was recovered against a mutual insurance company for the amount of a loss by fire. The execution was returned *nulla bona*, and the plaintiff applied for a mandamus to compel the defendants to pay over the money. In support of the application it was stated that an assessment had been levied by the defendants under their act of incorporation, for the purpose of paying this loss, and that they had received the money so levied. The writ was refused, because it was not clear on the affidavits that the corporation had no property out of which the debt could be levied—the statement being merely that the execution had been returned *nulla bona*; and because the defendants alleged that they were and always had been ready to pay over the money to the *persons entitled*, and the court would not decide in a summary manner on

conflicting claims. But *quære* whether the fact of the corporation having nothing which could be taken in execution would be a sufficient ground for interposing by mandamus. *Hughes v. The Mutual Fire Insurance Company of the District of Newcastle*, 241.

MARRIED WOMAN.

See HUSBAND AND WIFE.

Arrest — Trespass.]—1. A married woman living on terms of separation from her husband, who was in Europe, was arrested for debt. It was not shewn that the creditor had any knowledge of her having a husband living. *Held*, that although the wife might be entitled to her discharge on application, the arrest under such circumstances would not support an action of trespass. *Rennett et ux. v. Woods*, 29.

Promissory note.]—2. Where a married woman procured the plaintiff to indorse for her a bill of exchange, promising to indemnify him, and after her husband's death renewed the promise: *Held*, that no action would lie, though it was averred that the bill was negotiated for the defendant's own use.

Lee v. Muggeridge (5 Taunt. 36) held to be in effect overruled. *Dixie v. Worth*, 328.

MESNE PROFITS.

Ejectment by mortgagee after foreclosure—his right to mesne profits.]—Where a mortgagee brought ejectment after foreclosure, and the defendants appeared to be mere trespassers having no privity with the mortgagor, the plaintiff was held clearly entitled to mesne profits from the date of the foreclosure. *Mair v. Culy and Young*, 303.

MISAPPROPRIATION.

Meaning of.]—See Libel and Slander, 2.

MISDEMEANOR.

See BAIL.

MISJOINDER.

See HUSBAND AND WIFE.—PRACTICE.

MISNOMER.

Municipal Council for Municipality.]—See Municipal Corporation.

MISREPRESENTATION.

See SHERIFF, 2.—DECEIT.

MISTAKE.

See SURVEY.—WAIVER.

Word "plaintiff" used for "defendant."]—A mistake in inserting the word *plaintiff* instead of *defendant* is not fatal, even on special demurrer, when it is quite clear that the latter was intended, but the court may read the plea as if the right word had been used. *O'Donnell v. Hugill et al.*, 441.

MONEY HAD AND RECEIVED.

To recover back purchase money on sale of land.—See Deceit.

MONEY PAID.

Accommodation note discounted before, but paid by plaintiff after action brought, not recoverable—Costs of suit on such note.—It appeared that in May, 1852, the plaintiff, for the defendant's accommodation, gave him his promissory note for £50, which the defendant discounted at the Bank of Upper Canada. On the 9th of November, 1852, the defendant being sued by the bank, was obliged to pay this note, together with £5 13s. 2d. costs. On the 10th of September, 1852, the plaintiff gave another note to the defendant for £40, for his accommodation, for the purpose of renewing a previous note of the same

nature. This note also came into the hands of the bank and was paid to them by the plaintiff, but not until after the commencement of this suit, though the defendant had discounted and obtained the money on it before. The plaintiff having sued upon the common counts, for money paid, &c. *Held*, that he could recover only the amount of the £50 note; for, first, as to the costs, it was not shewn that the suit was defended by him at the request of the defendant, and if it had been, such costs should have been specially declared for, upon an undertaking to indemnify:—and secondly, as to the claim on the £40 note, the payment made by the plaintiff could not be referred back to the time when the defendant received the money from the bank; in other words, it could not be said that the money was paid by the bank for the plaintiff, and so paid by him to the defendant, before the commencement of this suit. *Held*, also that the fact of the plaintiff having been arrested only for the amount of the first note would be no objection to his recovery on the second, if he were otherwise entitled. *Lees v. Westley*, 322.

MORTGAGE.

See BILL OF SALE—CHATTEL MORTGAGES—DOWER, 3—EJECTMENT, 2—MESNE PROFITS.

Ejectment by mortgagor—*Mortgage outstanding when suit commenced. Notice required by mortgage to entitle mortgagee to possession after default, effect of.*—1. The defendant in ejectment produced a mortgage in fee given by the plaintiff on the land in question to one C., to secure the payment of £230 by instalments. By the terms of the mortgage the mortgagor was to remain in possession until default and until three months' notice in writing, after such default, demand-

ing payment. It appeared that the mortgage had been discharged by a certificate registered a week *after* the commencement of the action, and it was therefore contended that the plaintiff had no legal title when he began his suit. *Held*, that he might nevertheless recover, for no notice was proved to have been given as required by the mortgage, and he was therefore entitled to possession against the mortgage. *Sidney v. Hardcastle*, 162.

Mortgage by plaintiff to a third party set up by defendant in ejectment—*Effect of.*—2. In an action of ejectment, it was admitted that the plaintiff had mortgaged the premises in question to a building society, the condition of the mortgage being to pay 10s. on the first day of every month until the objects of the society, as stated in it, should be fulfilled. No default had been made, and it was proved that since action brought the society had released to the plaintiff their claim on the land in question. *Held*, that the plaintiff could not recover, for the expiration of the mortgage being uncertain, he was only a tenant at will when the suit was brought, and therefore not entitled to the possession; *Robinson, C. J.*, dissenting on the ground that a stranger to a mortgage cannot in any case defeat a recovery by the mortgagee, by setting up the mortgage where there has been no default, and the mortgagee, by the terms of the deed, is entitled to possession till default. *Ashford v. McNaughten*, 171.

MUNICIPAL CORPORATIONS.

See BY-LAW—MUNICIPAL ELECTIONS—NOTICE OF ACTION, 3—PLEADING, 1—PRACTICE, 3.

Power of Municipal Corporations with respect to taverns under 13 & 14 Vic. ch. 65, sec. 4—*Misnomer* “Mu-

nicipal Council” for “*Municipality*”—12 Vic. ch. 81, secs. 2, 31.]—*Held*, on an application to quash a by-law, that a rule nisi entitled as against “*The Municipal Council*” of a township, instead of “*The Municipality*,” was sufficient, though the latter is the proper designation. *Held*, also, that under 13 & 14 Vic. ch. 65, sec. 4, the municipal corporations had no power to pass a by-law prohibiting altogether the licensing of inns for the sale of wines or spirituous liquors by retail, or to be drunk therein; but that the legislature, by the words used in that section, either meant to give authority to prohibit the licensing of houses of public entertainment only, as distinct from inns (the one having a public bar-room and the other not), or, if they meant inns, that they meant only to give the power of preventing any one or more particular inns from being licensed. *In re Barclay and The Municipal Council of Darlington*, 470.

MUNICIPAL ELECTIONS.

Qualification of voters — Residence — Estoppel.]—1. A. had his dwelling-house at Bowmanville, where his wife and family resided, but he had a saw-mill and store, and was postmaster, in the township of Cartwright, which occasioned him frequently to visit that place, and while there he used to board with one of his men in a house owned by himself. *After voting at Bowmanville he went down to Cartwright, and voted there also at the election for township councillor, which was being held at the same time.* It appeared that the relator, one of the candidates for Cartwright, objected to A.’s vote there, but said that it should be accepted if he would swear that he was a resident; and that A. took such oath, and his vote was thereupon recorded. *Held* (reversing the decision of the Judge of the County

Conrt), that A.’s vote should have been rejected, for he was a resident of Bowmanville and entitled to vote there only, and his conduct in voting there first shewed that he regarded that as his home. *Held*, also, that the relator’s conduct could not estop him from afterwards objecting to the vote. *Regina ex rel. Taylor v. Caesar*, 461.

Disqualification — Contract with corporation—12 Vic. ch. 81, sec. 132, 16 Vic. ch. 181, sec. 25.]—2. The defendant was elected alderman for a ward in the city of Hamilton. It appeared that before the election he had tendered for some painting and glazing required for the city hospital:—that his tender was accepted, and that he had completed a portion of the work, for which he had not been paid. A written contract had been drawn up by the city solicitor, but not signed by defendant; and he swore that before the election he informed the mayor that he did not intend to go on with the work. *Held* (reversing the judgment in chambers), that the defendant was disqualified, as a contractor with the corporation:—that it was immaterial whether the contract would be binding on the corporation or not; and that his disclaimer could have no effect. *Regina ex rel. Moore v. Miller*, 465.

MUTUAL INSURANCE COMPANIES.

See INSURANCE, 4—MANDAMUS.

NAVIGATION.

See CARRIER.

NEGLIGENCE.

See RAILWAYS AND RAILWAY COMPANIES.

NEW ASSIGNMENT.

See TRESPASS.

Assumpsit—Plea of satisfaction as to part—New assignment thereto.]—The plaintiff declared in assumpsit for £100 due for goods sold and delivered, money lent, &c., &c. The defendant pleaded, as to £50, parcel, &c., that he gave his promissory note before action commenced for £50, payable in three months; that it was accepted in satisfaction of so much of the demand, and was not due when this action was brought. The plaintiff replied that he did not receive the note in satisfaction; and he now assigned that this action was brought not only for the causes of action covered by the plea, but also for other and different causes of action, as parcel of the causes of action declared on—that is, for other goods bargained and sold, &c., after the making of the said note. *Held*, that the new assignment was unnecessary, and bad on special demurrer. *Caspar v. Herschberg*, 486.

NEW TRIAL.

See DAMAGES, 2.—DOWER, 1—EVIDENCE, 5—EJECTMENT, 1.

Promissory note—New trial.]—1. In an action against the makers and endorsers of a promissory note, it is not necessary that all the defendants should concur in an application for a new trial. *Maulson v. Arrol et al.*, 81.

Malicious arrest.]—2. In an action for malicious arrest, the court refused to set aside a fourth verdict for the plaintiff, although wrong—alleging, as one reason, that the defendant should at least have obtained a special jury. *Smith v. McKay*, 111.

Three verdicts set aside—Misdirection.]—3. Third new trial granted, the jury having found three verdicts against an officer of the Court of Chancery on insufficient evidence. *Held*, that under the facts of this case (as set out in 10 U. C. R. 515,)

it was a mis-direction to tell the jury to find for the plaintiff if they were satisfied that the defendant received the money from him personally, and that he had not afterwards done or said anything to authorize the defendant to pay it out to his solicitor. *Sutherland v. Black*, 243.

Case for suing out attachment in Division Court—New Trial refused.]—4. In an action for maliciously suing out an attachment in the Division Court, it appeared that the defendant, when he made the affidavit, was aware that the plaintiff was then actually in prison. For the defence it was shewn that the goods attached were eventually sold under executions against the plaintiff, and therefore no substantial damage was suffered. The Court however refused a new trial on this ground, *the verdict being small.* *Owens v. Purcell*, 390.

Practice—New trial as to one of several defendants in trespass.]—5. Where in an action of trespass the verdict is in favour of some of the defendants and against the others, a new trial will not be granted as to the latter, but the application must be for a new trial against all, and the consent of those acquitted must be obtained, or the rule *nisi* served upon them. *Ward v. Murphy et al.*, 445.

NIAGARA FALLS FERRY.

See HIGHWAY, 2.

NISI PRIUS.

See PRACTICE, 2.

NOTICE OF ACTION.

14 & 15 Vic. ch. 54.]—1. A warrant to arrest the plaintiff was directed to one S. and all other peace officers of the county. The defendant was sworn in as a special constable to assist S., and he went alone, *not having the warrant with*

him, and made the arrest. On action brought, the jury found that the defendant believed that he was acting in the execution of his duty. *Held*, therefore, that under 14 & Vic. ch. 54, he was entitled to a month's notice of action. *Sage v. Duffy*, 30.

Notice of action—14 & 15 Vic. ch. 54, not retrospective.—2. Where an action was commenced after the passing of 14 & 15 Vic. ch. 54, for a trespass committed before, against an officer protected by this act, but not previously—*Held*, that the statute would not apply, and that the defendant was therefore not entitled to notice of action—Draper, J., dissenting. *White v. Clark, and Parsill v. Clark*, 137.

Municipal Corporations—Notice of action—12 Vic. ch. 10, 14 & 15, Vic. ch. 54.—3. Municipal Corporations are not within the provisions of 14 & 15 Vic. ch. 54, and are therefore not entitled to notice of action. *Brown v. the Municipal Council of the Township of Sarnia*, 215.

4. The notice of action set out in the statement of this case, held sufficient as to statement of place where injury committed, and of form of action to be brought. *Connolly v. Adams et al.*, 327.

Case for maliciously suing out attachment in Division Court—Notice of action under 13 & 14 Vic. ch. 53, sec. 107.—5. Case for maliciously suing out an attachment in the Division Court. *Held*, that the defendant was not entitled to a month's notice of action; for the statute was intended to protect persons acting under it in the discharge of some duty, and not parties proceeding for their own benefit. *Palk v. Kenney*, 350.

16 Vic. ch. 180 not retrospective—*Whether defendants acted as magistrates, a question for the jury.*—6.

Held, that the statute 16 Vic. ch. 180 is not retrospective, so as to make the notice of action required by it applicable to causes of action which have accrued before the passing of the act, or to compel the party injured to sue in case and not in trespass. *Held*, also, that in this case the evidence fully warranted a finding that the defendants were not acting or intending to act as peace officers, but as interested parties; and that this was a question properly left to the jury to determine. *Cusick v. Edward McRae and Rensselaer McRae*, 509.

NOTICE OF NON-PAYMENT.

See *BILLS OF EXCHANGE AND PROMISSORY NOTES.*

NOTICE OF TAXATION.

The omission to give notice of taxation is not in all cases a sufficient reason for setting aside judgment. *Riach et al. v. Hall, and Patterson v. Hall*, 356.

NOTICE OF TRIAL.

On writ of trial.—Notice of trial of a Queen's Bench cause in a County Court cannot be given by anticipation, before the writ of trial has been obtained. *Riach et al. v. Hall, and Patterson v. Hall*, 356.

NUISANCE.

See *HIGHWAY.*

Action for, by reversioner.—The defendant having erected a stable on his own ground, adjoining a dwelling house owned by the plaintiff, and rented to one W: *Held*, that this was not such a nuisance as would support an action by the plaintiff as reversioner, though it was shewn that he had been obliged in consequence of it to accept a lower rent for his house. *Lawrason v. Paul*, 534.

ONTARIO, SIMCOE, & HURON RAILROAD COMPANY.

See BY-LAW, 1.

1. An original shareholder in the O. S. & H. R. R. Co. having, after the passing of 16 Vic. ch. 51, paid the calls before them made on his shares, and voted at a meeting of shareholders, was held precluded from claiming the repayment of his instalments under the fourth clause of the act. *Barrow v. The Ontario, Simcoe, and Huron Railroad Company*, 124.

Compensation to tenants of land—12 Vic. ch. 196, secs. 10, 12, 16.]—

2. A railway act provided that the company should make satisfaction "to all persons and corporations interested" in any lands which should be taken under the powers given, and should agree with the "owners or occupiers respectively" touching the compensation to be paid to them. *Held*, that a tenant for a term of years was within the meaning of the act, and might maintain trespass against the defendants, who had entered and commenced their road, having made compensation only to the owner of the fee. *Johnson v. The Ontario, Simcoe & Huron Railroad Company*, 246.

Right to demand repayment of stock, under 16 Vic. ch. 51, sec. 4—

Compensation for injury to land,—

12 Vic. ch. 196, secs. 10, 14, 16, 20.]—

3. The plaintiff sold certain land to Messrs. S. & Co., contractors for the Ontario, Simcoe, and Huron R. R., for the purpose of said road. By their contract Messrs. S. & Co. took a number of shares in the company, for which they did not receive scrip at the time, but which they were to pay for in work. The plaintiff received in stock the price agreed on for the land, and the certificate for the shares was given to her by the defendants. The act 16 Vic. ch. 51 was subsequently passed, making

material alteration in the charter of the company, and the fourth clause provided that any *original shareholders* in the company (*Messrs S. & Co.*, and some others *excepted*) might within a given time apply for and obtain *repayment of any instalment paid by them in cash*, and have their shares cancelled. *Held*, that the plaintiff was not within the meaning of this proviso, and could not claim from the company the amount of her shares so obtained.

The defendants were sued for erecting a bridge over and along a public highway, running through the plaintiff's land and crossed by their line of railway running under such bridge, and for the injury thereby occasioned to the plaintiff's land in obstructing the access to the highway, &c. There was however sufficient room left for access at one end of the bridge. The jury found for the defendants, on the ground that no damage had been sustained, and the court refused to disturb the verdict. *Seem*, however, that there was no right of action, for the act incorporating the defendants bound them to do what was complained of, for the safety and convenience of the public, and made no provision for compensation which could apply in this case. *McDonnell v. The Ontario, Simcoe, and Huron Railroad Union Company*, 271.

Liability to make and maintain fences—Adjoining close—Cattle trespassing—12 Vic. ch. 196, sec. 18.]

4. Where the plaintiff's cow trespassing on A.'s close strayed upon the defendants railway adjoining, through a defect in the fence, which, in certain cases, as against A. the defendants were bound to make and maintain: *Held* on demurrer to the declaration, that plaintiff could not recover—*first*, because both at common law and by their act of incorporation, the obligation to make and maintain fences would apply only as against the own-

ers of the adjoining close; and *secondly*, because it was not clearly averred either that the owner of the land adjoining had requested the defendants to enclose their road, or that they had thought proper to do so; on one of which facts the obligation is made by the statute to depend. *Dolrey v. The Ontario, Simcoe, and Huron Railroad Union Company*, 600.

PARTNERS AND PARTNER-SHIP.

See EVIDENCE, 1.

Liability.—The defendant M., having been in business alone, was indebted to the plaintiffs for goods. He then entered into partnership with W., on the understanding that W. should share in the profits, and be liable for the debts from the commencement of M.'s business. *There was no written agreement between them.* After this arrangement W. was introduced to the plaintiffs by M. as his partner, and M. and W. together purchase from the plaintiffs to a considerable amount. W. then retired from the firm. *There was no evidence to shew that the plaintiffs were aware of the arrangement between M. & W.* Held, that such arrangement, without the assent of the plaintiffs, could not convert the separate debt of M. into the joint debt of the firm; and therefore that W. was liable only for the goods supplied after the partnership. *McKeand et al v. Mortimore and Wideman*, 428.

PAYMENT.

Appropriation of—*Stipulation that account should not run over a week.*—The defendant employed the plaintiff, a butcher, to supply his steamer with meat. At the close of 1851 he was indebted to the plaintiff, and authorized the captain of his steamer to pay this balance out

of her earnings in 1852. The defendant also agreed with the plaintiff to furnish supplies for 1852, but stipulated that if the account was allowed to run over a week at a time, he would not be answerable. The captain paid sums at different times in 1852, on account of the current supplies, but the account was frequently suffered to run over a week, and little more than half of the claim for the season was paid. Held, that the defendant could not insist on such payments being applied to wipe off the balance due for 1851, on the ground that the plaintiff had forfeited his account for 1852 by allowing it to accumulate: and, therefor, that the plaintiff, having recovered a verdict for the balance due in 1851, was entitled to retain it. *Winch v. Weller*, 233.

PENAL ACTION.

See CONVICTION.—USURY.

Jurisdiction of County Courts—4 § 5 *Vic. ch. 12.*—The County Courts have no jurisdiction in penal actions unless it is *expressly* given them by statute; and for this purpose they will not be included in the words "any Court of Record in Canada West." *O'Reilly qui tam v. Allan*, 526.

PENALTY.

See RECORDER'S COURT.

PLEADING.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.—CARRIER.—CONSIDERATION. — COSTS, 2.—EVIDENCE, 2.—INSOLVENT AND INSOLVENCY, 2.—MALICIOUS PROSECUTION, 2, 3.—MISTAKE.—NEW ASSIGNMENT.—ONTARIO, SIMCOE, & HURON R. R. Co., 4.—RIGHT OF WAY.—SHERIFF, 2.—TRESPASS—TROVER.

Overflowing land in repairing

highway—Plea of Justification by Municipal Council.—1. Case against a Municipal Council for overflowing the plaintiff's land. The defendants pleaded that the road eastward and westward of the plaintiff's premises was swampy and unsafe; that it was the duty of the defendants to repair and keep this road in good order, and that in the performance of such duty they committed the grievance complained of, doing no unnecessary damage to the plaintiff. *Held*, on demurrer, that it was not necessary to aver that the act complained of was done under a by-law, for that would *prima facie* be presumed, if essential,—but that the plea was bad for not shewing a sufficient justification, as it should have been alleged that the injury was one which the plaintiff was bound to submit to, and that no other course could have been taken for relieving the road. *Brown v. The Municipal Council of Sarnia*, 87.

Right of tenant for life to cut timber.—2. Case by the reversioner against the tenant for life, for cutting timber. Plea—That the defendant, as the servant of the tenant, and by her command, entered upon the lands, and cut down the trees, for the purpose of clearing the land and cultivating the same. *Held*, that the plea was bad on special demurrer; and *semble*, that it was also bad in substance, as shewing no justification. *Weller v. Burnham*, 90.

Loss of promissory note.—3. Assumpsit on a promissory note, payable to order, by the payee against the maker. Plea—Loss of the note by the plaintiff before the commencement of the suit, and that he hath been and is unable to produce the same, nor is the said note in his custody or control. *Replication*—that the plaintiff did not lose the said note in manner and form, &c., *Held*, on demurrer, replication good. *Campbell v. McCrae*, 93

Covenant—Inconsistent dates.—4. Action of covenant—Breach, non-payment of £150, which was to be paid by two equal instalments, the first on the 1st of May, 1851, and the second on the 1st of May, 1852. Second plea—That on the 22nd of September, 1851, the defendant made to the infant son of the plaintiff a good and sufficient deed in fee of a certain lot of land, which the plaintiff accepted in full satisfaction and discharge of the breaches of covenant declared on, and of all damages thereby sustained. Third plea—That the plaintiff ought not further to maintain his action, because by release under seal, dated 28th of February, 1853, he released to the defendant the causes of action in the declaration mentioned. *Held*, on demurrer, second plea bad for inconsistency of dates; and *semble*, also, that it should have been averred that the defendant had some interest in the land conveyed in satisfaction. Third plea good. *Phelan v. Fraser*, 94.

3 Vic. ch. 8—*Pleading.*—5. In an action against different parties to a note it is not essential to aver a liability or promise to pay, as in the form given by the statute. *Allen et al v. Leonard et al*, 98.

Obstruction of water-course by G. W. R. R.—Justification—Pleading.—6. Case for penning back the water of a stream supplying the plaintiff's mill, by placing a hatch or gate across the same. Plea—That the defendants were incorporated by acts of Parliament for the purpose of constructing a railroad, and were thereby empowered to intersect or cross any stream on the route of the said railroad, and to construct the said railroad across or upon the same: that the said stream was on the route of the said railroad, and it was necessary that the said railroad should be constructed across the same; whereupon the defendants, in accordance with the

powers and provisions of the said acts *placed the said hatch or gate* in and across the said stream, and continued the same there—the said portion of the road not being completed at the commencement of this suit, so as to enable the defendants to restore the said stream to its natural state. *Held*, on demurrer, plea bad, as not confessing and avoiding, or traversing the injury complained of; and for not showing a sufficient justification. *Anderson et al. The Great Western Railroad Company*, 126.

Building agreement—Covenant—Pleading.—7. In covenant on a building agreement the declaration stated that the plaintiffs agreed to do all the necessary carpenter's and joiner's work about the building to be erected on defendant's property, according to the specification annexed to the agreement and a plan made by A. M. which was incorporated with and formed part of the agreement; and to perform the same to the satisfaction of and under the superintendence of the said A. M.; and the defendant, in consideration of the premises, agreed to pay the plaintiffs £490, as follows—that is to say, to convey certain lots to plaintiffs, on the completion of the work at the rate of two pounds per foot frontage; and the balance to be paid, two-thirds as the work progressed, in proportion to the work done, on receiving A. M.'s certificate to that effect, and the remaining one-third on the completion of the work. Performance by the plaintiffs of the covenants on their parts was then averred, and that the defendant accepted the work as completed; and the breach assigned was, that although the defendant in part performance of his covenant, paid to the plaintiffs £449 9s 10½d., yet he had not paid the residue of the £490 or any part thereof. *Held*, on demurrer, that it was unnecessary to

set out the specifications in the declaration, but that the approbation of the architect should have been averred, or the omission of it sufficiently excused; and that the breach stated was insufficient, in making no mention of the agreement to convey. *Melville et al. v. Carpenter*, 130.

Account stated—Pleaded in bar.—8. In assumpsit for work and labour it is sufficient to plead that, after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, the plaintiffs and defendant accounted together of and concerning the causes of action in the declaration mentioned, and of and concerning certain other demands of the defendant against the plaintiffs; and upon the accounting a sum of £50, and no more, was found to be due from defendant to plaintiffs, which he the defendant then promised to pay to the plaintiffs, and which he hath always been willing to pay. *Melville et al. v. Carpenter*, 132.

Covenant—Conditions precedent—Pleading.—9. Covenant—*Declaration*, that by certain articles of agreement—after reciting that it had been agreed that the plaintiff should make certain improvements in a house for the defendants for the sum of £260,—in consideration that the plaintiff did, in and by the said agreement, covenant with the defendants to make the said improvements before the 15th of May then next ensuing, the defendants covenanted that they would pay for the said improvements at the rate of £50 every three months from the first of February then last past; and it was further agreed that the plaintiff was to allow the defendants the value of the fronts taken out of the said house out of the £260, at a fair valuation by disinterested persons to be chosen by each party; that the plaintiff had always been ready and willing to allow the defendants the value of

the said fronts out of the said £260 at a fair valuation, according to said agreement; yet that a period of fifteen months had elapsed since the 1st of February, and that the plaintiffs had not paid the several sums of £50 to be paid every three months amounting to £250, or any of them or any part thereof. *Held*, on demurrer, declaration bad, because it was not shewn that any of the work had been performed, and therefore the defendants could not be called upon to pay; and because it should have been averred either that the window fronts were valued, or that the plaintiff had appointed an arbitrator, and called upon defendants to do the same. *Elliott v. Hewitt et al.*, 292.

False return to fi. fa.—Estoppel against action for—Pleading.—10. To an action against a sheriff for falsely returning to a *fi. fa.* goods in hand to the value of 5s., and *nulla bona* as to the residue, when enough had in fact been seized to satisfy the writ, the defendant pleaded, secondly, that he did not seize or take in execution the said goods and chattels in the declaration mentioned, in manner and form, &c.; and *ninthly*, by way of estoppel, that the plaintiff requested the defendant to return *nulla bona*, and accepted and acted on that return and took out a *ven. ex.* with a full knowledge of the facts. *Held*, on demurrer, both pleas good. *Miller v. Thomas*, 302.

Duplicity.—11. Declaration in case for wrongfully keeping up certain dams, and for wrongfully increasing the height of the same, and thereby penning back the water of the Grand river, and causing it to flow against the plaintiff's mills and over his premises. *Plea*, That at the passing of the act incorporating the defendants one Jackson owned a close and mill below that of the plaintiff, from and upon which the said dams were constructed, and

had a right and easement appurtenant to said close of penning back the water upon the plaintiff's mill and premises, which right became vested in one Wilks, who had a right by prescription to pen back the water, &c., when the defendants purchased from him; and that because the said dams were within the limits of the act incorporating the defendants, and were necessary for the navigation, the defendants purchased them from said Wilks, and maintained and upheld them, &c.—*quæ sunt eadem*, &c. *Held*, on demurrer, plea bad, for duplicity, in setting up, first, an easement by prescription, and, secondly a statutory right. *Kerby v. Grand River Navigation Co.*, 334.

POWER.

Excessive execution of.—See Will.

PRACTICE.

See APPEAL.—DIVISION COURT, 1.
—MUNICIPAL CORPORATIONS.—
NEW TRIAL, 1, 5.—NOTICE OF
ACTION.—NOTICE OF TAXATION.—
NOTICE OF TRIAL.—VENIRE DE
NOVO.—WAIVER.

*Causes of action improperly joined—
Arrest of judgment, or venire de novo.*—
—1. CASE, by the husband alone, for
negligent and unskilful treatment of
his wife in childbirth. The first
count was bad for merely stating
negligence, without averring any
damages accruing therefrom. The
second count alleged that by reason
of the defendant's improper treat-
ment of the plaintiff's wife her life
was endangered, and she was much
injured,—being a ground of action
for which the husband could not sue
alone. The third count combined dif-
ferent causes of action, some for which
the husband should sue alone, and
others for which the wife should be
joined. *Held*, that the proper course
was to arrest judgment, not award a
venire de novo. *Smith v. Carder*, 77.

Ejectment — *Practice at Nisi Prius.*]—2. A plaintiff in ejectment having opened his case as heir-at-law of the patentee relying upon the assumed limited effect of his own deed to the defendant, was not allowed to change his ground and shew himself entitled under the Statute of Limitations. *McKinley v. Bowbeer*, 86.

Copy of by-law moved against described as annexed, but not annexed, to applicant's affidavit.]—3. In an application to quash a by-law, a paper was put in purporting to be a copy of the by-law authenticated by the seal of the corporation, and certified by the township clerk to be a true copy of a by-law passed on, &c., (corresponding in date with that moved against;) also an affidavit of the applicant in which he swore that *the annexed* copy of the by-law (describing it accurately by title and date) was a true copy of the by-law received by him from the township clerk. On shewing cause against the rule it appeared, and was objected, that the by-law was not annexed to the affidavit, and there was no appearance of any paper having been attached thereto—but held, that the objection could not prevail. *Bessey v. The Municipal Council of Grantham*, 156.

PRINCIPAL AND AGENT.

See DECEIT.

PRICE.

Need not be fixed by contract of sale.]—See AGREEMENT, 6.

PRIORITY.

See ATTACHMENT, 2

PRIVILEGED COMMUNICATION.

See LIBEL AND SLANDER, 2.

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PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

QUARTER SESSIONS.

See CERTIORARI.—HABEAS CORPUS.

Constitution of Quarter Sessions—7 W. IV. ch. 4, sec. 2—8 Vic. ch. 13, sec. 3.]—It is no objection that neither the Judge of the District Court nor any barrister was present when a conviction was made. *Regina v. Crabbe*, 447.

QUIET ENJOYMENT.

See TAXES, 1.

QUI TAM ACTION.

See PENAL ACTION.—USURY.

QUO WARRANTO.

Held, that the office of director in the Galt and Guelph Railway Company was not an office for which an information in the nature of a *quo warranto* would lie. *Regina v. Hespeler et al.*, 222.

RAILWAYS AND RAILWAY COMPANIES.

See AGREEMENT, 3, 4.—GREAT WESTERN RAILROAD CO.—ONTARIO, SIMCOE & HURON R. R. Co.—QUO WARRANTO.

Action for fire caused by sparks from locomotive—Evidence of negligence—Necessity for keeping the line clear of brushwood, &c.]—Case, against a railway company for negligence and improper management of a locomotive, so that sparks escaped and set fire to the plaintiff's timber near the line of road. It appeared that the fire was caused by the engine, but that all usual and proper precautions had been used in the construction and management of it. *Held*, that on this evidence the defendants should in reason have succeeded; and a verdict having been found for the

plaintiff, a new trial was granted on payment of costs. *Seemle*, however, that in such cases it would add materially to the defendants case to show that they thoroughly cleared away all logs and brushwood, &c., from the whole space occupied by their line of railway in its ordinary width. *Hewitt v. The Ontario, Simcoe, and Huron Railroad Union Company*, 604.

RECORDER'S COURT.

16 Car. I. ch. 10—*Penalty—Recorder's Courts.*]—The 16 Car. I. ch. 10, was intended only to apply to the Court of Star Chamber and other courts therein mentioned, and not to such tribunals as the Recorder's Court for the city of Hamilton; therefore an action against the mayor, acting as president of such court, charging that he falsely and knowingly caused a verdict of guilty to be recorded against the defendant on his trial for larceny, and claiming to recover therefor the penalty of £500 sterling imposed by the sixth clause of the statute, was held not sustainable. And, at all events, the record *being unreversed*, would have protected the defendant. *Stark v. Ford*, 363.

REGISTRATION.

See BILL OF SALE—CHATTEL MORTGAGE.

13 & 14 Vic. ch. 63—*Registry—Conveyance by execution debtor after sale, but before sheriff's deed.*]—1. A.'s land was sold under an execution in 1843, but the sheriff did not execute a deed to the purchaser until 1853. In 1852 A. conveyed to one C, who conveyed to the plaintiff. The last two deeds were registered, but that from the sheriff was not. *Held*, That the prior registry of the plaintiff's title could not defeat the sheriff's deed, for the

lands were bound by the execution and sale, and therefore out of A.'s power to convey. *Burnham v. Daly*, 211.

Conveyance of growing timber—Registration.]—2. *Held* (affirming the decision in *Ellis v. Grubb*, 3 O. S. 611) that growing timber is so far real estate that a conveyance of it by the owner of the fee is within the registry acts. *Ferguson v. Hill et al.*, 530.

RELEASE.

Plea of] See Pleading, 4.

RENT.

See FRAUDS (STATUTE OF)—SHERIFF, 1.

REPLEVIN.

14 & 15 Vic. ch. 64—*Replevin.*]—1. The declaration in an action of replevin under 14 & 15 Vic. 64, was for "taking and unjustly detaining" certain goods. The defendants pleaded "non ceperunt" and a special plea of lien. The evidence shewed that the defendants came lawfully by the goods, but that they had no right to detain them. A rule for nonsuit was discharged, as the plaintiffs had succeeded on the second plea, and thereby established their right to the goods; and *seemle*, that although the defendants had obtained a verdict on "non cepit," yet the plaintiffs were entitled to judgment generally—such issue being either immaterial or determined in the plaintiffs' favour by proof of detention. *Waters et al. v. Ruddell et al.*, 181.

Goods seized under legal process.—14 & 15 Vic. ch. 64.]—2. Goods seized under an attachment from a Division Court may be replevied by a third party claiming them as his own. *Arnold v. Higgins*, 191.

14 & 15 Vic. ch. 64—*Writ directed to coroners*]—3. Where the

sheriff is defendant, a writ of replevin under 14 & 15 Vic. ch. 64. may be directed to the coroners, though the statute does not provide for such a case. An objection that there was in fact no taking or detention cannot be urged as a ground for setting aside the writ, but must be decided at the trial. *Gilchrist v. Conger*, 197.

RESIDENCE.

Nature of residence required to qualify as voter]. See Municipal Elections, 1.

REVERSIONER.

Action by, for nuisance]. See Nuisance.

RETURN OF CONVICTION.

See CONVICTION.

RIGHT OF WAY.

Pleading—Estoppel].—In an action for obstructing a right of way, the defendant justified under a plea that the close over which the supposed way passed was, before the committing of the alleged grievance, a public way, and that such way was shut up by order of the Municipal Council. *Held*,—Plea bad, the plaintiff's private right of way not being necessarily extinguished by the closing of the public road. In a fourth plea, the defendant denied the right of way claimed, and the plaintiff replied, by way of estoppel, a judgment in his favour in a former suit with the plaintiff, in which the same right was in question, averring the way claimed to be the same in both actions. *Held*, on demurrer, a good replication, for if the right had been lost by anything occurring since the former action, the defendant should have shewn it. *Cornelius Johnson the younger v. Boyle*, 101.

ROAD.

See HIGHWAY—BY-LAW, 2—PLEADING, 2.

RULE.

Entitling of rule Nisi against Municipal Corporations]. See Municipal Corporations.

SALE.

See AGREEMENT, 6—BILL OF SALE.

SATISFACTION AND DISCHARGE.

See PLEADING, 4.

Acceptance of note in satisfaction of account—Effect of, as to remedy on the latter].—Assumpsit for goods sold and delivered, and on account stated. Plea—That before the commencement of this suit the defendant made and delivered three negotiable notes to the plaintiffs, "who then accepted and received the same in full satisfaction and discharge of the sum of money and causes of action in the said declaration mentioned." Replication—that the notes were dishonoured at maturity, and still remain in the plaintiffs' hands unpaid. *Held*, that the replication was bad, for the plaintiffs having accepted the notes in full satisfaction and discharge of the original causes of action, had lost their remedy upon the latter. *Loomer et al v. Marks*, 16.

SCHOOLS.

See COMMON SCHOOLS.

SEAL.

See BY-LAW, 1—LEASE.

SEISIN.

Evidence of]. See DOWER, 1.

SHERIFF.

See AGREEMENT, 1—PLEADING, 10
—REPLEVIN, 3.

8 *Anne*, ch. 14—*Action for sale of goods, not reserving rent—Liability of sheriff.*—1. The sheriff, having seized goods under a *fi. fa.*, received a written notice from the plaintiff that there was then due to him “one half year’s rent” for the premises—not stating when the rent fell due, nor for what period it was claimed. The plaintiff afterwards went to the sheriff; and being asked when his rent fell due, said that he thought it would be *on the following Monday or Tuesday*. The sheriff thereupon ordered the goods to be removed and sold. *Held*, that he was justified in so doing, as he was acting in reliance on the plaintiff’s own declaration; and that he was not liable for any damages, although it appeared that the rent was in fact payable quarterly, and that one quarter was due at the time of seizure. *Tomlinson v. Jarvis*, 60.

Sheriff’s right to sue for price of land sold for taxes—What facts must be set out in the declaration—13 & 14 *Vic.* ch. 67; 16 *Vic.* ch. 183—*Right of sheriff to maintain assumpsit for the price of goods sold under execution.*—2. The sheriff, as well as the treasurer, may maintain assumpsit for the price of land sold for taxes; but in such an action it should be expressly averred that the defendant promised to pay for the land and accept a certificate within a reasonable time; and the statement of a general promise to do all things to be performed on his part as purchaser of the lands under the provisions of the statute, was held insufficient, on special demurrer. *Semble*, that the sheriff may also recover in assumpsit for the price of goods or lands sold by him under execution in ordinary cases. As regards a purchaser of land sold for taxes, it is to

be assumed in the first instance that the sale was authorized and regular, and if anything was in fact done which could invalidate it or defeat the title, it is for him to shew it; therefore, in an action against such purchaser for the price, it was held unnecessary to state in the declaration that the collector was unable to collect the taxes; or had assigned any reason why he could not do so—or for what years the arrears were due—or to shew that the notice given was regular in every respect—(and an irregularity in this point would not necessarily invalidate the sale) or that the lands sold were the lands of non-residents when they were assessed, or when the collectors could by law collect the taxes thereon; but that an averment that they were such when the warrant was delivered to the sheriff was sufficient. *Held* also, that the defendant sufficiently appeared to be the highest bidder by an allegation that he bid and offered to take the smallest quantity of the respective lots for the taxes, interest, and expenses due thereon. *Jarvis v. Cayley*, 282.

SHERIFF’S DEED.

See REGISTRATION, 1.

SLANDER.

See LIBEL AND SLANDER.

SPECIAL JURY.

When it should be obtained.—See New trial, 2.

SPECIFICATIONS.

Need not be set out in declaration on building agreement.—See Pleading, 7.

STABLE.

See NUISANCE.

STATUTE OF FRAUDS.

See FRAUDS (STATUTE OF).

STATUTE OF LIMITATIONS.

See LIMITATIONS (STATUTE OF).

STATUTES (CONSTRUCTION OF).

- 13 Eliz. ch. 5—See Fraud.
- 42 Eliz. ch. 6—See Costs, 2.
- 16 Car. I. ch. 10—See Recorder's Court.
- 29 Car. II. ch. 3—See Frauds (Statute of)—Lease.
- 8 Anne, ch. 14—See Sheriff, 1.
- 13 Geo. II. ch. 7—See Alienage.
- 13 Geo. III. ch. 21—See Alienage.
- 2 Geo. IV. ch. 1, sec. 17—See Commission to examine witnesses.
- 4 Geo. IV. ch. 21—See Alienage.
- 4 Wm. IV. ch. 13—See Grand River Navigation Co.
- 4 Wm. IV. ch. 29—See Great Western Railway Co.—Quo Warranto.
- 5 Wm. IV. ch. 3—See Insolvent and Insolvency.
- 5 & 6 Wm. IV. ch. 62, sec. 15—See Declarations.
- 6 Wm. IV. ch. 18—See Insurance, 4.
- 6 Wm. IV. ch. 20—See Stock.
- 3 Vic. ch. 8—See Pleading, 5.
- 4 & 5 Vic. ch. 12—See Conviction—Penal Action.
- 7 Vic. ch. 10—See Insolvent and Insolvency.
- 8 Vic. ch. 13—See Quarter Sessions.
- 8 Vic. ch. 20—See Evidence, 3.
- 8 Vic. ch. 45—See Sunday.
- 8 Vic. ch. 48—See Insolvent and Insolvency, 2.
- 10 & 11 Vic. ch. 15—See Insolvent and Insolvency.
- 12 Vic. ch. 10—See Notice of Action, 3.
- 12 Vic. ch. 71—See Lease.
- 12 Vic. ch. 74—See Chattel Mortgage.
- 12 Vic. ch. 81—See Municipal Corporations—Municipal Elections—Practice, 3.
- 12 Vic. ch. 83, secs. 69, 70, and 71—See Common Schools.
- 12 Vic. ch. 196—See Ontario, Simcoe, and Huron R.R. Co.
- 13 & 14 Vic. ch. 15—See Highway.
- 13 & 14 Vic. ch. 48—See Common Schools.
- 13 & 14 Vic. ch. 53—See Attachment—Costs 1—Division Court—Judgment.

13 & 14 Vic. ch. 63—See Registration.

13 & 14 Vic. ch. 65—See Municipal Corporations.

13 & 14 Vic. ch. 67—See Sheriff, 2—Taxes, 2.

14 & 15 Vic. ch. 51—See Great Western R. R. Co.

14 & 15 Vic. ch. 54—See Notice of Action.

14 & 15 Vic. ch. 64—See Replevin.

14 & 15 Vic. ch. 114—See Ejectment.

16 Vic. ch. 42—See Quo Warranto.

16 Vic. ch. 51—See Ontario, Simcoe, and Huron R.R. Co.

16 Vic. ch. 80—See Usury.

16 Vic. ch. 175—See Execution.

16 Vic. ch. 180—See Notice of Action, 6.

16 Vic. ch. 181—See Municipal Elections.

16 Vic. ch. 183—See Sheriff, 2.

STAYING PROCEEDINGS.

See CONVICTION.

STOCK.

See ONTARIO, SIMCOE, AND HURON R. R. Co., 3.

*British America Assurance Company—Transfer of stock, how far complete without acceptance—6 W. IV. ch. 20, sec. 5.]—*Certain stock in the British America Assurance Company was transferred by A., and the transfer entered in the stock ledger, so that the shares stood in the name of the transferee. Before any acceptance had been signed the shares were seized by the sheriff under an execution against the transferor. The transferee then signed a formal acceptance in the books of the company, and brought an action against the sheriff's vendee to recover the dividends which had been paid to him. *Held*, that the transfer was complete without acceptance, as against the transferor and all claiming under him; and therefore that the seizure was illegal, and the plaintiff entitled to recover. *Woodruff v. Harris*, 490.

SUNDAY.

8 Vic. ch. 45.]—1. A note given on account of a sale made on Sunday, is not void in the hands of an innocent holder for value. *Crombie v. Overholtzer*, 55.

Plying steamboat on Sunday—“Travellers”—8 Vic., ch. 45 secs. 1, 3.]—2. The defendant was held liable under 8 Vic. ch. 46 for plying with his steamboat on Sunday, between the city of Toronto and the Peninsula—persons carried between those places not being “travellers” within the meaning of the exception in the act, *Regina v. Tinning*, 636.

SURRENDER.

Of term.]—See Arbitration and Award, 1.

SURVEY.

Error in marking posts of original survey.]—A mistake of a surveyor in marking the number of the concessions wrong on some of the posts of an original survey, will not make it proper to describe the lots so marked as being in the concession numbered on the posts. *Jarvis v. Morton*, 431.

TAVERNS.

See MUNICIPAL CORPORATIONS.

TAXES.

See SHERIFF, 2.

Incumbrance — Damages.]—1. Taxes due upon land at the time of sale are an incumbrance within the covenant for quiet enjoyment; but the plaintiff can recover only the sum due for arrears at the date of the conveyance. *Haynes v. Smith*, 57.

13 & 14 Vic. caps. 67 & 69—Sale for taxes due prior to 1851—Want of due notice of sale, effect of.]—2, Held,

that under 13 & 14 Vic. ch. 67 lands of non-residents could be sold for taxes due prior to January 1st, 1853. Held, also, that a sale would not be invalid for want of due advertisement thereof in a newspaper published in the county where the lands are situated, as required by sec. 50. *Jarvis v. Brooke* 299.

TENANT FOR LIFE.

Right of, to cut timber.]—See Pleading, 2.

TENANTS IN COMMON.

See TRESPASS, 1.

TIMBER.

Damages in trespass for taking.]—See Damages, 2.

Right of tenant for life to cut.]—See Pleading, 2.

Growing timber — Necessity for registering deed of.]—See Registration, 2.

TITLE.

See INSURANCE, 1.

TOLLS.

See EVIDENCE, 1.

TRANSFER OF STOCK.

How far complete without acceptance.]—See Stock.

TREATY.

Of 1794, or Jay's treaty, construction of.]—See Alienage.

TRESPASS.

See COSTS, 2.—DAMAGES, 2.—FALSE IMPRISONMENT. — GREAT WESTERN R. R. Co., 2.—MARRIED WOMAN, 1.—NEW TRIAL, 5.—ONTARIO, SIMCOE & HURON R. R. Co., 2.

Pleading--Tenants in common of chattels.]--1. Trespass.--First count, for breaking and entering defendant's close, and taking away wheat; second count, for taking away wheat. *Pleas*, to each count, leave and license; and to the second count, that defendant and plaintiff were owners of the wheat in common, and that defendant of his own right committed the trespass. It was admitted at the trial that the defendant was entitled to half the wheat as tenant in common with the plaintiff, and that the trespass complained of was the entering on the premises and taking away the other half, to which he had no claim. *Held*, that on these facts and pleadings, the action must fail; for as to the pleas of leave and license, the entry was lawful, and the plaintiff should have new assigned if he relied on the excess; and as to the remaining plea, one tenant in common of a chattel cannot maintain trespass against another for merely taking the chattel into his sole possession. *Culver v. Macklem and Dingman*, 513.

Pleading--New assignment.]--2. In trespass against a sheriff and his bailiff for seizing and taking goods and converting and disposing thereof &c., the defendants justified under a *fi. fa.* from the County Court. The plaintiff in his replication admitted the writ, and warrant, but new assigned that the said trespass was committed for other purposes than those in the plea mentioned, and after the return of the writ. The defendants pleaded to this justifying again under the writ, and, averring that from the time of seizing the goods the defendant continued in possession thereof until the said time when &c., when they removed the goods for the purpose of levying part of the moneys directed to be levied. The plaintiff, admitting the writ and warrant, replied *de injuriâ absque residuo causæ*. *Held*,—That on these pleadings, the only

question in issue was whether the goods were taken under colour of the writ and warrant, and that the plaintiff could not shew than an excessive sum was claimed for sheriff's fees, and the goods taken to enforce payment of such sum; for if this would have made the defendants trespassers, it should have been specially replied. *Spalding v. Jarvis* 596.

TROVER.

See DIVISION COURT, 1.—LIEN, 1.

Quære, whether a plea of lien in trover is bad on special demurrer. A replication of *de injuria* to such a plea is proper. *Nicholls v. Duncan*, 332.

TRUST DEED.

Of personal property, must be registered.]—See Bill of Sale.

UNCERTAINTY.

See AGREEMENT, 5—ARBITRATION AND AWARD, 3—BY-LAW, 2.

USURY.

Penal action for—16 Vic. ch. 80.]—Before the passing of 16 Vic. ch. 80, a *qui tam* action was commenced under 51 Geo. III. ch. 9 sec. 6, for taking an illegal rate of interest. *Held*, that the suit could not be continued, for by the first mentioned act the court had lost the power of giving judgment for the penalty; but *semble*, that contracts prohibited by the former law must still be held void. *Jones qui tam v. Ketchum*, 52.

VENIRE DE NOVO.

See PRACTICE, 1.

1. Where the plaintiff had a general verdict in an action of debt on several counts, and the defendant succeeded on a demurrer to a plea to the first count, a *venire de novo* was awarded. *Melville et al. v. Carpenter*, 202.

2. Where one count is good and

another bad, and the damages general, the court will not arrest judgment, but award *venire de novo*. *Owens v. Purcell*, 390.

WAIVER.

Practice—Irregularity—Waiver of service of process, and of appearance.]—A writ of summons was issued in the *Common Pleas*, and an appearance entered thereto in the same court. The plaintiff then filed his declaration in the *Queen's Bench*, and served it with a demand of plea about the 16th of June. This demand of plea was returned by letter by the defendant's attorney on the 4th of July, with an acceptance of service endorsed, and no notice was taken of the discrepancy. Interlocutory judgment was signed on the 29th of June; and on the 5th of September notice of assessment was served, no pleas having been sent in the mean time. The plaintiff's attorney was not asked to waive the judgment, and he therefore went on and assessed damages according to his notice. In the next term the defendant moved to set aside the assessment for irregularity—not stating in his affidavits that there was in fact any defence. *Held*, that the defendant's attorney, by his conduct, had waived the want of service of process, and of appearance. *Williams v. Rapelje et al.*, 420.

WATER-COURSE.

See EVIDENCE, 3.

WHARFINGERS.

Liability of for goods lost.]—The plaintiff landed with his goods in the night at the defendants' wharf. The landing waiter of the custom house being there, sent a person employed by the defendants as watchman against fire to get the key of their warehouse on the wharf, and all the

plaintiff's goods were put into it except a packing case for which there was no room. Next day the plaintiff got all his goods except the case, and paid the defendants' charges upon them. The case was lost. The plaintiff was asked by one of the defendants to go and look at a box in the town which was thought to be his; not to speak of the loss; and to furnish a list of the things contained in the case. *Held*, that there was sufficient evidence to go to the jury to charge the defendants; and a very moderate verdict having been given, much less than the amount of the loss, the court refused to disturb it. *Towers v. Talbot et al.*, 614.

WILL.

See CONDITION.

Excessive execution of power.]—1. A testator devised to his wife all his property, real and personal, "as long as she, my said wife, shall exist; and at her decease the said property to be at her sole disposal unto any one or other of my descendants, so as the said property and land shall be entailed in the family, from one generation to another. *Held*, that a devise by the widow *in fee* was an excessive execution of the power, and therefore void. *Scane v. Hartwick*, 550.

Estate tail, or fee.]—2. A testator after devising certain land to his son William and his heirs, added "and it is my will and intention that, if the said William should die leaving no legitimate issue, the said two lots to vest and be to the said Walter" (another son) "and his heirs," and &c.—making provision for the estate going to his other sons successively, in case of failure of issue;" and if the last named should die leaving no legitimate issue, then the same to the surviving heirs of my family, in equal proportion. *Held*, That William took an estate

tail, not a fee and that a conveyance by him (before the 9th Vic. ch. 11.) was void. *O'Reilly v. Corrie*, 557.

—◆—
WITNESS.

See CHATTEL MORTGAGE.

—◆—
WORDS (CONSTRUCTION OF.)

“*Misappropriation.*”]—*See* Libel and Slander, 2.

“*Travellers*”]—*See* Sunday, 2.

WRIT OF TRIAL.

See EXECUTION.—NOTICE OF TRIAL.

The filing of the writ of trial with the verdict endorsed on it, signed by the Judge of the County Court, is a sufficient compliance with the statute. The want of a *postea* according to the form given in the rule of court of H. T. 10 Vic. was held no objection, and if indispensable the court would have allowed such *postea* to be afterwards filed. *Riack et al. v. Hall and Paterson v. Hall*, 356.

